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Supreme Court, U. S.
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SUPREME COURT OF UNITED STATES

OCTOBER TERM, 1904.

Nos. 3 and 4.

ALBERT HUDSON,
PLAINTIFF IN ERROR,
vs.
THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

ANDREW J. AIKENS,
PLAINTIFF IN ERROR,
vs.
THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF ON RE-ARGUMENT FOR PLAINTIFFS IN ERROR.

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TABLE OF CONTENTS.

PAGE.

Statement of Case 2-5
Argument 5-108
Appendix 109-156

INDEX TO APPENDIX.

Statute in question 109
Decision here for review 109
Decision in same case on *habeas corpus* 109-152
Decision in Youghiogheny Coal Co 152-156

INDEX TO ARGUMENT.

CHAPTER 1.

Illustrative instances from adjudged cases and otherwise of acts formerly considered lawful, but made criminal by statute in question as construed 6-23

CHAPTER 2.

Information discussed 23-26

CHAPTER 3.

Advantages resulting to the accused from the agreement or combination in question 26-37

CHAPTER 4.

Of the right to refuse to contract with any person and the question of motive in such refusal as affecting the exercise of that right 37-47

CHAPTER 5.

Boycott and unlawful strike cases distinguished, and the illegal feature of that class of cases pointed out 47-72

CHAPTER 6.

Malice in its legal relation to the exercise of the right to refuse to contract 72-83

CHAPTER 7.

The law of criminal conspiracy in its relation to those constitutional rights of persons which require for their exercise the co-operation of two or more persons 84-90

CHAPTER 8.

Damnum absque injuria necessary to be observed; its disregard puts legal rights on same footing as legal wrongs 90-91

CHAPTER 9.

Of the plea herein, and showing that if malice in fact was the ground of accused's liability the plea could not have been lawfully held insufficient 91-95

CHAPTER 10.

Presents the direct constitutional question whether the courts or legislature of a state may restrain the liberty to contract by punishing the refusal to contract when such refusal is malicious or from malicious motives 95-105

CHAPTER 11.

Of the effect of declaring certain acts legal wrongs on account of their causing loss to third persons, thus establishing a correlative right in such third person and thus in the instant case denying the equal protection of the laws 105-108

TABLE OF CASES.

PAGE.

Adler vs. Fenton, 24 How. 407....19, 77, 90
Ah Jow. In re, 29 Fed. Rep. 181.... 9
Ajello vs. Worsley, 1898, 1 Ch. 274.... 77
Allen vs. Flood, 1898, App. Cas. 1....40, 77
Allgeyer vs. Louisiana, 165 U. S. 578....35, 40, 96
Anderson vs. U. S., 171 U. S. 604, 19 Sup. Ct. Rep. 50....12, 30, 90
Arthur vs. Oaks et al., 11 C. C. A. 209, 63 Fed. Rep. 310....40, 50, 51, 52
Auburn, etc., Co. vs. Douglass, 9 N. Y. 444.... 75
Aurora vs. West, 7 Wall. 93 op.... 6

Baggs Case, 11 Coke 98a.... 22
Baker In re, 29 How. Pr. 485.... 43
Baker vs. Sun Ins. Co., 64 S. W. Rep. (Ky.) 967.... 76
Barr vs. Essex Trades Council et al., 53 N. J. Eq. 101, 30 Atl. Rep. 881.... 63, 64, 65
Beck vs. Ry. Teamsters' Protect. Union, 118 Mich. 497, 77 N. W. Rep. 13.. 68
Block vs. Schwartz, 76 Pac. Rep. 22.... 103
Bohn Mfg. Co. vs. N. W. L. Assn., 54 Minn. 223, 55 N. W. Rep. 1119, 21 L. R. A. 337....21, 53, 63, 90
Booth vs. Illinois, 184 U. S. 425, 22 Sup. Ct. Rep. 425.... 105
Boston Glass Mfg. Co. vs. Binney, 4 Pick. 425.... 45
Boulier vs. MacCauley, 91 Ky. 135, 15 S. W. Rep. 60.... 76
Bowen vs. Matheson, 14 Allen 499....13, 30, 45, 90
Boyer vs. West. Union et al., 124 Fed. Rep. 246.... 90
Boyson vs. Thorn, 98 Cal. 578.... 76
Budd vs. N. Y., 143 U. S. 517, 12 Sup. Ct. Rep. 468.... 17

Carew vs. Rutherford, 106 Mass. 1....40, 44
Chambers vs. Baldwin, 91 Ky. 122....72, 76
Chatfield vs. Wilson, 28 Vt. 49.... 74
Chicago vs. Hurlbert, 68 N. E. Rep. 786.... 43
Chipley vs. Atkinson, 23 Fla. 206.... 74
Coffeyville, etc., vs. Perry, 76 Pac. Rep. 848....38, 95, 102
Com. vs. Hunt, 4 Met. 111....13, 22, 45
Com. vs. Perry, 155 Mass. 117, 14 L. R. A. 325....44, 96, 100
Com. vs. Waterman, 122 Mass. 43.... 87
Connolly vs. Union Sewerpipe Co., 184 U. S. 540....77, 108
Continental Ins. Co. vs. Underwriters, 67 Fed. Rep. 310....77, 79
Cote vs. Murphy, 159 Pa. St. 420, 28 Atl. Rep. 190.... 107
Cox vs. Lee, L. R. 4 Ex. 284.... 70

Delz vs. Winfree, 80 Tex. 400, 16 S. W. Rep. 111, 6 Tex. Civil Ap. 11, 25 S. W. Rep. 50.... 68
Docter et al. vs. Riedel et al., 96 Wis. 158....12, 73, 80
Doremus vs. Hennessey, 176 Ill. 608....40, 67
Dueber Watch Case Co. vs. E. H. Watch & Clock Co, 66 Fed. Rep. 637....17, 31

Eaton vs. Johns, 1 Dowl. N. S. 602.... 70
Erdmann vs. Mitchell et al., 207 Pa. 79, 56 Atl. Rep. 327.... 47

Felton vs. U. S., 96 U. S. 699.... 92
Frazier vs. Brown, 12 Ohio St. 294.... 74
Frisbie vs. U. S., 157 U. S. 160.... 43

Gauvreau vs. Superior, etc., Co., 62 Wis. 403.... 70
Giblan vs. Nat'l, etc., Union, L. R. 2 K. B. Div. (1903) 600.... 94
Gillespie vs. People, 188 Ill. 176, 52 L. R. A. 283.... 103
Glamorgan Coal Co. vs. South Wales, etc., L. R. 2 K. B. Div. (1903) 545.. 94
Glencoe, etc., Co. vs. Hudson, etc., Co., 138 Mo. 439, 40 S. W. Rep. 93...75, 76
Godcharles vs. Wigeman, 113 Pa. St. 431.... 100
Gray vs. Building Trades Council (Minn), 97 N. W. Rep. 663.... 48
Greenwich, etc., Co. vs. Carroll, 125 Fed. R. 121.... 104
Grice In re, 79 Fed. Rep. 627, 169 U. S. 234, 18 Sup. Ct. Rep. 328....18, 90

PAGE.

Hake vs. Brames, 95 Ind. 161 70
Harwood vs. Benton, 32 Vt. 724 74
Hawarden vs. Coal Co., 111 Wis. 549 ..... 2, 93, 152
Heywood vs. Fillson, 75 Me. 225 ..... 22, 62
Hoare vs. Silverlock, 12 Q. B. 624 70
Hopkins vs. Oxley Stave Co., 83 Fed. Rep. 912 62
Hunt vs. Simonds, 19 Mo. 583 ..... 11, 90
Huttley vs. Simmons, 1898 1 Q. B. 181 77

Iron Co. vs. Uhler, 75 Pa. 467 14

Jacobs In re, 98 N. Y. 98, 50 Am. Rep. 636 100

Kearney vs. Lloyd, 26 L. R. (Irish) 268 90
Kelly vs. Ry. Co., 93 Ia. 436, 61 N. W. Rep. 957 77
Kiff vs. Youmans, 86 N. Y. 324 77
Knudsen vs. Benn, 123 Fed. Rep. 636 63

Lawton vs. Steele, 152 U. S., 133, 18 Sup. Ct. Rep., 499 101
Louisville vs. Louisville, 14 L. R. A., 579 108
Lumley vs. Gye, 2 El. & Bl., 216 76

MacCauley vs. Tierney, 37 L. R. A., 455 20
Machine Co. vs. Gage, 100 U. S., 676 8
Mahan vs. Brown, 13 Wend., 261 74
Martell vs. White et al., 69 N. E. Rep., 1085 ..... 53, 94
Mathews vs. Illinois, 202 Ill., 389 108
Millett vs. People, 117 Ill., 294 100
Montana Co. vs. St. Louis Co., 152 U. S., 170 ..... op. 9
Mugler vs. Kansas, 123 U. S., 623; 8 Sup. Ct. Rep., 273 101
Munn vs. Illinois, 94 U. S., 113 17

National P. Assn. vs. Cummings, 170 N. Y., 315; 58 L. R. A., 135 69
Niagara F. Ins. Co. vs. Cornell, 110 Fed. Rep., 816 ..... 9, 95, 104

O'Callaghan vs. Cronan, 121 Mass., 114 77
Orr vs. Ins. Co. et al., 12 La. Ann., 255 ..... 11, 90

Park & Sons Co. vs. Nat'l Drug Assn., 175 N. Y., 1; 67 N. E. Rep., 136; 62 L. R. A., 632 67
Passaic Print Works vs. Ely, Etc. Co., 44 C. C. A., 426; 62 L. R. A., 673 .. 78, 80
People vs. Gillson, 109 N. Y., 389 ..... 10, 29, 95, 100, 103
People vs. Warren, 34 N. Y. Supp., 942 ..... 43, 96
Penn. R. R. Co. vs. Marchant, 119 Pa. St., 541 7
Perkins vs. Pendleton, 90 Me., 166 62
Phelps vs. Nowlen, 72 N. Y., 39 ..... 12, 22, 74
Plant vs. Woods, 176 Mass., 492; 51 L. R. A., 339 ..... 56, 61
Potter vs. U. S., 155 U. S., 438 92

Quin vs. Leathem, 1901 App. Cas., 495 80

Raycroft vs. Tayntor, 68 Vt., 219 ..... 12, 14, 73
Rex vs. Kilderby, 1 Saunders, 308 3
Rice vs. Albee, 164 Mass., 88 56
Rideout vs. Knox, 148 Mass., 368 45
Ritchie vs. People, 155 Ill., 98; 29 L. R. A., 79 100
Robinson vs. Texas Pine Land Assn., 40 S. W. Rep., 843 80

Scottish Etc. vs. Glasgow Etc., 35 Scot. L. R., 645 30
Solverson vs. Peterson, 64 Wis., 198 70
Sherburne vs. Rodman, 51 Wis., 474 92
South Royalton Bank vs. Suffolk Bank, 27 Vt., 505 ..... 74, 90
Spalding vs. Vilas, 161 U. S., 483; 6 Sup. Ct. Rep., 631 78
St. Joseph vs. Levin, 31 S. W. Rep., 101 43

PAGE

State vs. Buchanan, 5 Harr. & J., 317 86
State vs. Burnham, 15 N. H., 396 87
State vs. Dalton, 22 R. I., 77; 46 Atl. Rep., 234; 48 L. R. A., 775 104
State vs. Dodge, 56 Atl. Rep., 983 104
State ex rel. Durner vs. Huegin, 110 Wis., 249 104
State vs. Glidden, 55 Conn., 46; 8 Atl. Rep., 90 73
State vs. Goodwill, 33 W. Va., 176; 6 L. R. A., 621 85
State vs. Julow, 129 Mo., 163; 29 L. R. A., 257 100
State vs. Loomis, 115 Mo., 307; 21 L. R. A., 789 ..... 10, 42, 95
State vs. Santee, 53 L. R. A., 763 100
State ex rel. Zillmer vs. Kreutzberg, 114 Wis., 530 105
Steamship Co. vs. McGregor, 21 Q. B. D., 544; 23 Q. B. D., 599; 1892 App. Cas., 25 ..... 28, 29, 39, 95, 101
Street vs. Varney Etc. Co., 160 Ind., 338; 66 N. E. Rep., 895 ..... 11, 22, 25, 30, 65, 66, 77
Stuart vs. Palmer, 74 N. Y., 183 104
 9

Temperton vs. Russel, 1 Q. B., 715 65
Thorley vs. Lord Kerry, 4 Taunt., 355 70
Toledo Etc. Ry. Co. vs. Penn. Ry. Co., 54 Fed. Rep., 730 65
Trade Mark Cases, 100 U. S., 82 9

Underhill vs. Murphy (Ky.), 78 S. W. Rep., 482 63

Van Horn vs. Van Horn, 52 N. J. L., 284 55
Van Horn vs. Van Horn, 56 N. J. L., 318 65
Vegelahn vs. Guntner, 167 Mass., 92; 35 L. R. A., 722 55
Villers vs. Monsley, 2 Wils., 403 70

Walker vs. Cronin, 107 Mass., 555 ..... 16, 68, 74, 80
Wallace vs. Ga. Etc. Rd. Co., 94 Ga., 732 ..... 41, 96
West Va. Tr. Co. vs. Standard Oil Co., 50 W. Va., 611 ..... 14, 90

TEXT BOOKS.

American Bar Assn. Rep., Vol. 21 (1898), 335-390 ..... 72, 74
Bishop Statutory Crimes, 2d Ed., Sec. 447 24
18 Central Law Journal, 424 77
Cooley, Torts 668, 830, 278 ..... 14, 41, 97
1 Eddy Trade Comb., Sec. 480 16
Greenhood Public Policy, Rule 303 43
8 Harvard Law Review, 511 75
1 Jag., Torts 87 14
Pollock, Torts, Webb's Ed., 331—335 79
Proceedings Amer. Economic Assn., 1899, 78-173 ..... 87, 88
R. S. Wis., 1898, Sec. 4466a 109
1 Whart. Crim. Law, 10th Ed., Ch. 2 85
2 Whart. Crim. Law, 10th Ed., Ch. 21, Sec. 1338 87
Wright Crim. Conspiracy, Sec. 14 86

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ANDREW J. AIKENS,
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vs.

THE STATE OF WISCONSIN,
DEFENDANT IN ERROR.

BRIEF ON RE-ARGUMENT FOR PLAINTIFFS IN ERROR.

A writ of error was sued out of this Court by each of the plaintiffs in error above named, directed to the Supreme Court of the State of Wisconsin, to review the final judgment of that Court affirming the judgment of the Municipal Court of Milwaukee County, Wisconsin, which adjudged the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt guilty of having committed a misdemeanor, as charged in the information, to-wit: conspiracy to injure another in his trade or business under Section 4466a of the Statutes of Wisconsin of 1898, and sentenced each of them to

pay a fine with costs, and in default of payment to be committed to the House of Correction of Milwaukee County at hard labor until such fine and costs were paid, not, however, to exceed thirty days.

STATEMENT.

I. (In the appendix to this brief (see index) there will be found the statute of the State of Wisconsin under which the prosecution was brought, the opinion of the Supreme Court of Wisconsin upon the decisions brought up by this writ of error, the prior opinion of the Supreme Court of Wisconsin in this same case on habeas corpus, and the opinion of the Supreme Court of Wisconsin in the case of *Hawarden vs. Coal Co.*, 111 Wis., 549, construing and explaining its decisions in this case to apply to cases of trade competition.)

II. October 1st, 1901, an information (printed record, p. 16) was filed in the Municipal Court of Milwaukee County, Wisconsin, which attempted to set up an offense under the above statute. Reduced to its simplest form, the information, in substance, charged that the accused, viz: the plaintiff in error Albert Huegin, the plaintiff in error Andrew J. Aikens, and one Melvin A. Hoyt, each of whom was the business manager of a daily newspaper published in the City of Milwaukee, in said county, respectively named the Milwaukee Sentinel, The Evening Wisconsin and the Milwaukee Daily News, for the purpose and with the intent of wilfully, maliciously and *unlawfully* injuring the Journal Company (which was a corporation engaged in publishing another daily newspaper in said city, viz.: The Milwaukee Journal) *in its trade and business*, and also Lucius W. Nieman, Lloyd T. Boyd and John W. Schaum (who were stockholders and officers of The Journal Company), and each of them, in their trade and business; had combined together and *agreed that if any person advertising or proposing to advertise* in The Milwaukee Journal *should pay* The Journal Company

an increased rate then recently established or fixed by it, then and in that case any SUCH PERSON *should not be permitted to advertise in any of the other three newspapers,* to-wit: The Milwaukee Sentinel, The Evening Wisconsin and The Milwaukee Daily News, *unless* SUCH PERSON *should advertise in each of said three papers and should pay to each of them an increase equal to the said recent increase of the Journal's rates over the rates theretofore charged by said three papers respectively; but that in case any person should refuse to pay to The Journal Company its increased rate, then such person should be at liberty to advertise in either or all of the other three papers at the rates which had theretofore been charged by them respectively;* and further charged, in substance, that in pursuance of said agreement advertisers had been notified of said agreement and had been induced to withdraw their advertisements from The Milwaukee Journal, and other advertisers had been prevented from advertising therein, all to the injury of The Journal Company.

III. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, each interposed a separate special plea in bar (printed record, p. 19.) These pleas are exactly alike and are in the nature of pleas in confession and avoidance, a precedent for which is found in *Rex vs. Kilderby,* 1 Saunders, 308, cited 1 Chitty Crim. Law, 472.

They admit the agreement and acts in pursuance thereof, as alleged in the information, and while they assert that the intent was to injure The Journal Company, they do not admit that their acts were either malicious or unlawful, but on the contrary they allege "that those acts, intentions, agreements and combinations were done, harbored, made and entered into in *trade competition,* and that such acts, intentions, agreements and combinations, and none other, constituted the alleged unlawful conspiracy in said information mentioned," and as free men and citizens of the United States and of the State of Wisconsin and as competitors in business with The Journal Com-

pany they claimed immunity therefor under Article XIV of the Constitution of the United States, notwithstanding any statute of the State of Wisconsin or judicial decision of the courts of the State of Wisconsin to the contrary.

IV. The prosecution moved to strike out the special pleas above mentioned, which motions were denied, and thereupon asked that said motions might stand and be considered as demurrers to such special pleas, and the accused consenting thereto it was so ordered. After a hearing the demurrers to said special pleas were sustained, and the accused having elected to stand on their said pleas, were found guilty thereon, as charged in the information, and sentenced as above mentioned.

V. Upon writ of error the Supreme Court of the State of Wisconsin affirmed this judgment (printed record, p. 52), and to review the latter judgment this writ of error was sued out.

VI. The plaintiff in error Albert Huegin, and the plaintiff in error Andrew J. Aikens, have each filed assignments of error upon which they rely to reverse said judgment. They are alike, and in substance are as follows (printed record, p. 9):

(1) The Court erred in sustaining the demurrers interposed by the State of Wisconsin to the pleas filed by the accused, and by holding and deciding that the facts stated in said pleas were not sufficient to constitute a defense to the matters and things charged in the information.

(2) The Court erred in determining that the pleas filed by the accused were not a sufficient justification and defense under the XIVth amendment of the Constitution of the United States.

(3) The Court erred in sustaining the demurrers of the State of Wisconsin to the pleas of the accused *and in not deter-*

mining upon said pleas that the information was insufficient in law.

(4) The Court erred in adjudging the accused guilty on the record before it, viz: said information and pleas, and sentencing them to fine and imprisonment and affirming the judgment of the trial court in that regard, for the reason that said record shows that said sentence and conviction were in violation of the rights of said accused under the XIVth amendment of the Constitution of the United States, in that it deprived them of the use of their property without due process of law, and in that it deprived them of the liberty guaranteed them by said XIVth amendment to make contracts not inimical to public health, welfare or morals, and in that it deprived the said accused of their liberty and abridged the privileges and immunities of said accused as citizens of the United States, and denied to them the equal protection of the law.

VII. Melvin A. Hoyt, above mentioned, demurred to the information; his demurrer was overruled, and standing on his demurrer he was found guilty, as charged in the information, and he was sentenced in the same manner. Upon writ of error the Supreme Court of Wisconsin affirmed this judgment, and to review this latter judgment he has sued out his writ of error.

ARGUMENT.

I.

The precise question presented is this: does Section 4466a, Wisconsin Statutes of 1898 as interpreted and applied by the Wisconsin Supreme Court, deprive the accused of their liberty or property or deny to them the equal protection of the law in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

In this brief we assume that it is settled law that there is in this section of the Constitution an *express restriction* against the state, through any of its governmental agencies, executive, legislative or judicial, depriving any person of liberty or property without due process of law and that the words "liberty or property" not being defined in the Constitution it is for the Court to determine their scope and meaning according to the usual rules of construction, including of course the meaning which has been given to these words or either of them in judicial decisions, or juristic writings.

In the former brief and argument in this cause in this Court the said Wisconsin statute construed as it is by the decisions of the Supreme Court of that state hereinbefore mentioned, was challenged upon like grounds and the distinction following referred to without making, however, separate chapters of the different points of attack thereon. It may be more orderly to separate the argument as follows, viz.:

1.

It is elementary and logical that a demurrer to any subsequent pleading is carried back to the first defective pleading in the cause (*Aurora vs. West*, 7 Wall., 93 op.) consequently the demurrer of the state to the plea in bar of the accused in the Court below first tests the sufficiency of the information as effectively as a demurrer to that information would do. We will therefore first present the argument from the standpoint of a demurrer to the information, and in a separate chapter discuss the sufficiency of the plea of the accused. The first thing that strikes us is the extraordinary generality of the statute in question. It prohibits two or more persons from associating or concerting together for the purpose of wilfully or maliciously injuring another in his reputation, trade, business or profession *by any means whatever*. "By any means whatever," of course includes lawful means, that is to say includes the exercise of means authorized or justified by some rule of law. The statute, therefore, expressly covers the case of one person being injured in his reputation, trade, busi-

ness or profession by the exercise on the part of two or more other persons of some otherwise unquestioned legal right which such two or more other persons might possess, or by the doing of any otherwise innocent or harmless act on the part of such two or more other persons. Provided, of course, such legal right were exercised wilfully or maliciously. But of these words hereafter. The statute further punishes any person maliciously compelling another to do or perform any act against his will without regard to the legal quality of the act compelled, or the status or relations of the parties; and also punishes those who associate or concert together for the purpose of preventing or hindering any other from doing or performing any lawful act. What acts are lawful must be determined not from this statute but from the great body of laws written and unwritten. It is lawful to compel another to do or perform many acts against his will, such as to compel him to pay a debt. So it must be criminal under this act to compel another to perform an act against his will and it also must be criminal to hinder the first from compelling the other to do the act against his will. So with the association or concert for the purpose of injuring another in his reputation, trade, business or profession. To punish one man for causing loss to another in his reputation, trade, business or profession by lawful means, viz. by the exercise of some legal right possessed by the first, is to deny totally the doctrine of *damnum absque injuria* without which doctrine no system of law would be consistent with due regard for the liberty of the citizen. But this statute forbids this injury, " by any means whatever."

If the Supreme Court of Wisconsin had limited the word "injury" in this penal statute to mean, "an infraction of some legal right" (*Penn. R. R. Co. vs. Marchant*, 119 Pa. St., 541; same case 13 Atl. Rep., 690) or had excepted the acts of co-operation in trade competition, from the purview of the statute in the decision now before this Court on writ of error, different questions might arise. But that Court did not do so. It treated loss of customers as an "injury." Because this is the only injury claimed.

By reason of the generality of the words, "by any means whatever," just as soon as we depart from the legal or technical meaning of the word, "injuring," in the construction of this statute and give that word the meaning of "causing loss or damage," we have an unconstitutional statute because then the statute is made to read as follows:

"If two or more persons wilfully or maliciously combine to "cause loss to another *by any means whatever*, they shall be "punished,"

that is to say, if loss result to one from the wilful or malicious exercise of a legal right by others the latter shall be punished. This would make persons hold every legal right, including the right to contract, the right to hold property, the right to sue, the right to marry, the right to vote, the right to travel and generally every right, subject to arrest and inquiry as to the motives with which he exercised that legal right.

The question of the constitutionality of Section 4466a hereinbefore referred to must be determined in this Court upon the construction given to that statute by the Supreme Court of Wisconsin (*Machine Co. vs. Gage*, 100 U. S., 676) namely: that the statute is meant to prohibit intentional joint action of any kind, which joint action is intended to cause a loss of trade to another. This includes within the purview of the statute co-operation in trade competition. Thus construed we submit the statute is unconstitutional and in conflict with the Fourteenth Amendment to the Constitution of the United States. It is not difficult to instance cases of purely innocent acts which under this statute as interpreted and applied by the Supreme Court of Wisconsin, would be deemed criminal. A partnership agreement for the purpose of engaging in trade which would invade the business field of another and injure him in his business by reducing the number of his customers, would be an instance. If this statute so construed covers the case of a partnership, as we think it unquestionably does, then the statute must fall as unconstitutional because its constitutionality is to be tested not only by what has been declared criminal under it but by what may be so declared, for a criminal statute can-

not be used as a drag net to ensnare the guilty and the innocent, leaving the latter to extricate themselves as they can.

Trade Mark Cases, 100 U. S., 82.

Montana Co. vs. St. Louis Co., 152 U. S., 170 op., citing *Stuart vs. Palmer*, 74 N. Y., 183.

In re Ah Jow, 29 Fed. Rep., 181.

Not only does the Wisconsin statute as construed, subject to criminal prosecution those who enter into an ordinary partnership to compete in trade and win away customers from another, at least provided a jury finds their intentions in doing so to be malicious, but it makes criminal many agreements in trade competition approved and found to be a lawful exercise of the right of liberty of contract by many other eminent courts. For example: several insurance companies concerting or agreeing together to fix rates on different property.

Niagara Fire Ins. Co. vs. Cornell, 110 Fed. Rep., 816, from which we quote (p. 824):

"If we cannot acquire property, then we have a government "of socialism. And how can we acquire property, or enjoy the "property we do have without the right of contract? If this "law is valid two or more farmers cannot agree that they will "not sell their wheat to a neighboring mill for less than so much "per bushel. Two or more farmers cannot agree that the live-"stock feeder shall not have their corn, only at a certain price. "Blacksmiths cannot agree that they will charge so much for "shoeing horses. Nothing can be agreed to by the manufac-"turer, the farmer, gardener, the contractor, consumer or lab-"orer, to prevent the reduction of price. Can it be possible that "such legislation is valid? If it is valid, then what becomes of "the provision, 'no man shall be deprived of equal protection "'of the law,' or of that other provision, 'that no man shall be "'deprived of life, liberty or property without due process of "'law'? Justice Field once said: 'The right to pursue them "'without let or hindrance is a distinguishing privilege of the "'citizens of the United States and an essential element of that "'freedom which is their birthright.' Another justice of the "United States Supreme Court said: 'Yet the power does not "'and cannot extend to prohibiting a citizen from making con-"'tracts and this is institutional law in England as well as "'America.' Another great judge has said: 'Liberty includes

"'the right to acquire property and that means and includes "'the right to make and enforce contracts'."

Again, for example: If two or more employers agree together to employ only those persons who did not belong to labor unions as one employer did in *State vs. Julow*, 29 L. R. A., 257 (Mo.), from which we quote:

"Nor can the statute escape censure by assuming the label "of a 'police regulation.' It has none of the elements or attri- "butes which pertain to such regulation, for it does not in terms "or by implication promote or tend to promote the public "health, welfare, comfort or safety; and if it did, the state "would not be allowed under the guise and pretense of a police "regulation, to encroach or trample upon any of the just rights "of the citizen which the constitution intended to secure against "diminution or abridgement."

Again for example: This construction of the statute would make criminal the agreement of two or more persons to sell, exchange or dispose of any article of food upon any representation that a gift, prize or premium will be given therewith to the purchaser, as was done by one person in *People vs. Gillson*, 109 N. Y., 389; 17 N. E. Rep., 343, where the Court said:

"This statute, if valid, steps in to prevent his adopting such "a course to procure trade and from it to secure an income "and livelihood for himself and family. He is thus restrained "in the free enjoyment of his faculties which he ought to have "the right and liberty to use in the way of creating or adopting "plans for the increase and growth of his trade, business or oc- "cupation unless such restraint is necessary for the common "welfare. * * * That a man engaged in trade will not for "any length of time continue to sell an article below what it "costs him to procure it, is a safe assumption, while it is "equally safe to say that he may do so for a time—long enough "to enable him to introduce his article to the notice of the "public and to create a demand for it which he will make a "profit by supplying. Or he may make a profit by supplying "one article which will amount to enough to enable him to give "away some other article with it and permit him to receive the "average rate of profit in the business which he is engaged in."

Again for example: This construction would make criminal and unlawful a concert or agreement to give an advantage

either by way of rebate or bonus to those persons who would take away all patronage from the competitor, and give the parties making such offer their whole trade, as was declared lawful in *Steamship Co. vs. McGregor*, 21 Q. B. D., 544; 23 Q. B. D., 598, 1892, App. Cas., 25.

Also for example: Where two or more persons agreed not to write insurance on any boat upon which the plaintiff was employed as in *Orr vs. Ins. Co. et al.*, 12 La. Ann., 255; 68 Am. Dec., 770, the Court said:

"Undoubtedly either of the defendants had the right separ-
"ately to decline taking any risk on any boat on which the
"plaintiff should be employed as master. Nor could the mo-
"tives of the company be questioned; whether they were ma-
"licious and with the sole design of injuring the plaintiff or
"not, would be entirely immaterial in a legal point of view so
"long as there was no contract on their part and no legal obli-
"gation to insure such boat. Courts can enforce only legal ob-
"ligations and redress injuries to *legal* rights." * * * The
"inconvenience which the plaintiff has suffered is but a *damnum*
"absque injuria."

This case is sometimes erroneously cited to sustain the broad proposition that whatever one may lawfully do alone two or more acting together may lawfully do, but this is erroneous, an unwarranted deduction of a general rule from a single instance and we make no such contention.

Also for example: Where several persons agreed that neither of them would insure a particular item of property owned by the plaintiff as in *Hunt vs. Simonds*, 19 Mo., 583, where the Court said (p. 591):

"He (plaintiff) had no right in law to demand insurance
"upon his boat from one or all of the defendants, nor that they
"should insure cargo upon his boat, and consequently their re-
"fusal to insure from any motive however improper could give
"him no right to sue them."

Also for example: Where several persons engaged in the business of buying cattle as yard traders associate and agree that they will not transact business with others in the same business who are not members of defendant's association but who may become such members by complying with the condi-

tions of membership as in *Anderson vs. United States*, 171 U. S., 604; 19 Sup. Ct. Rep., 50. The Court said:

"In the view we take of this case we are not called upon to "decide whether the defendants are or are not engaged in inter- "state commerce. * * * From very early times it has been "the custom for men engaged in the occupation of buying and "selling articles of a similar nature at any particular place to "associate themselves together. * * * The design of the "defendants evidently is to bring all the yard traders into the "association as members so that they may become subject to its "jurisdiction and be compelled by its rules and regulations to "transact business in the honest and straightforward manner "provided for by them * * * and if for the purpose of "compelling this membership the association refuse business "relations with those commission merchants who insist upon "buying from or selling to yard traders who are not members "of the association, we see nothing that can be said to affect the "trade or commerce in question other than in the most round- "about and indirect manner."

In the case at bar did not the plaintiff in error alone, or with those associated, have the right to refuse their advertising columns absolutely to all who did not give him or them sole patronage? This includes the right to refuse to receive advertising from anyone who patronized the competitor, the Journal. But here they did not go so far but only refused, except on condition, not all the Journal's patrons, but only some of them.

Also for example: Where two persons, one of them a bank, conspired together for the purpose of destroying plaintiff's credit and business and without any demand or notice to plaintiff caused a judgment to be entered on *cognovit* against the plaintiff and immediately issued execution and (the sheriff) forcibly broke into plaintiff's store and levied on his property, as in *Docter et al. vs. Riedel et al.*, 96 Wis., 158, where the Court said:

"By this instrument the plaintiffs authorized its holder to "enter judgment and issue execution, and this is all that has "been done. The defendants seem to have acted strictly within "their right. The general rule is that where one exercises a "legal right his undisclosed motives are immaterial. *Phelps vs. "Nowlen*, 72 N. Y., 39; *Raycroft vs. Tayntor*, 68 Vt., 219; 33 "L. R. A., 225. We see no reason why the rule should not

"apply here. The defendants having collected their debt in a "way which they were authorized to use, *we cannot punish "them for their secret motives.*"

Again for example: Where one sustained a loss of custom or patronage by reason of an association or organization or combination of two or more who refused to furnish or ship sailors to him and took their sailors out of ships because his men were in the same ship, as in *Bowen vs. Matheson*, 14 Allen, 499, where the Court said:

"We can see nothing criminal in any of these stipulations; "See *Commonwealth vs. Hunt*, 4 Met., 111; and nothing illegal. "If their effect is to destroy the business of shipping masters "who are not members of the association, it is such a result as "in the competition of business often follows from a course of "proceeding that the law permits. New inventions and new "methods of transacting business often destroy the business of "those who adhere to old methods. Sometimes associations "break down the business of individuals and sometimes an indi- "vidual is able to destroy the business of associated men. It "would be nothing novel if the plaintiff, in the exercise of his "ingenuity, should in his turn adopt some improvement that "shall compel the defendants to dissolve their connection. As "the declaration sets forth no illegal acts on the part of the "defendants the demurrer must be sustained."

Applying this in the case at bar the decision below would make criminal all new devices and new methods which would cause loss to an established business in the exercise of trade competition.

Again for example: Where two corporations engage in competition with a third corporation, "maliciously and wick- edly contriving and intending to injure the plaintiff and ruin its business," did confederate and conspire together and with another to prevent all persons producing, refining, selling or transporting oil, from executing any lawful trade in connection therewith, with such competitor, and purchased the land on which the plaintiff had its pipe lines and from which it trans- ported oil for compensation, obtained a controlling interest in the corporation which furnished the plaintiff oil for transpor- tation and induced the construction of a rival pipe line com- pany to transport said oil, as alleged in the declaration and ad-

mitted by demurrer in *West Virginia Transportation Co. vs. Standard Oil Company,* 50 W. Va., 611; 40 S. E. Rep., 591, it was ruled that there was no right of action in the plaintiff. The Court said among other things:

"The mere fact that a complainant may have suffered dam-"age of the kind which the law recognizes is not enough. There "must also be a violation of a duty recognized by law. In the "language of the civil law mere *damnum* is not enough; there "must also be *injuria;* that is, '*ex damno absque injuria non* " '*oritur actio.*' I Jag. Torts, 87. We must nicely distinguish " between *damnum* and *injuria.* We commonly use the words " 'injury' and 'damage' indiscriminately, but in the rule above, "these Latin words are distinct. 'Damnum' means only harm, "hurt, loss, damage; while 'injuria' comes from 'in,' against, and " 'jus,' right, and means something done against the right of "the party producing damage and has no reference to the fact "or amount of damage. Unless a right is violated, though there "be damage, it is *damnum absque injuria.* Such is the case un-"der the first count of the declaration. The plaintiff had a "perfect right to operate its business. So had the defendants "the right to operate theirs. They both had right to compete "for business. There is no right better established under the "law of business than the right of trade competition."

Again: "An act which does not amount to a legal injury "cannot be actionable because done with a bad intent. Any "transaction which would be lawful and proper if the parties "were friends, cannot be made the foundation of an action "merely because they happen to be enemies. So long as a man "keeps himself within the law by doing no act which violates it, "we must leave his motives to Him who searches the heart. To "state the point in a few words, whatever one has a right to do "another cannot have a right to complain of. *Cooley Torts,* "688, 830. 'If one be moved by malice to the exercise of a legal " 'right, no action arises.' *Raycroft vs. Taynton,* 68 Vt., 219; "35 Atl. Rep., 53; 33 L. R. A., 225; 54 Am. State Report, 882. " 'A lawful act is not actionable though it proceed from mali-"cious motives.' *Iron Co. vs. Uhler,* 75 Pa., 467."

The Court further said:

"The gravest item under this head is the charge that the "Standard Company required oil producers (without specify-"fying any but the West Virginia Oil Company), as a condition "precedent to purchasing their oil, to ship through said pipe "line and required those producers in the land of the West

"Virginia Oil Company to do so as a condition precedent to "holding their leases, notwithstanding that the more usual "and satisfactory route of transport was the pipe line "of the plaintiff; and that later the defendants, through "the Eureka Pipe Line Company, to further accomplish their "purpose of ruining the plaintiff, built a branch pipe line "through territory which had for years patronized the plaint-"iff's line, in order to prevent and forestall the plaintiff from "transacting, acquiring or maintaining any business and from "extending its line to any other territory, and that the defend-"ants and confederates by their monopoly and control over the "oil business, refused to ship, or permit others to ship oils or "buy oils shipped through the plaintiff's line, and being the only "refiners of oil at Parkersburg and elsewhere, refused to buy "oil shipped through the pipe line of the plaintiff. At first "blush this conduct might appear wrong; but a second thought "again presents the question whether the defendants in this "did anything unlawful. The defendant companies were all in "common interest. *Could they not unite to further their in-"terests?* Could not the Standard Oil Company buy from "whom it chose? And within the pale of this right could it "not impose such conditions as it chose? Cannot the village "merchant say to the farmer, 'I will not buy your eggs unless "'you buy my calico?' Can not the big mill owner refuse to "buy wheat from those who do not ship it over a railroad or "steamboat line owned by him? Can not the mill owner refuse "to lease his farm to those who do not sell products to his mill? "He may be exacting and oppressive but can other mill owners "sue him for this? Is this right not a part and parcel of his "business right? It is the right even when there is no common "ownership as there is in this case of one man to buy of whom "he chooses and he can impose arbitrary, hard conditions if the "other party chooses to accede to them. *So it is the clear right "of the other party to sell to whom he chooses*, and he having "this right, how does the other party do a wrong in purchasing "from him? The right of the one carries with it the right of "the other. * * * Counsel for plaintiff put emphasis on "the charge of conspiracy and malice, but there can be no con-"spiracy to do a legitimate act—an act which the law allows— "nor malice therein. To give action there must not only be "conspiracy, but conspiracy to do a wrongful act. If the act "is lawful no matter how many unite to do it."

Observe in this case that the acts were lawful and the combination or association for that purpose was lawful. The defendants had the legal right to do the acts complained of and

had in addition the legal right to concert togther for that purpose. In the same case there was, however, another charge in the first count of the declaration to the effect that the defendants wickedly and maliciously, to injure the plaintiff, represented to the customers of the plaintiff that the plaintiff's pipe lines and appliances were unsafe and dangerous for the transportation or storage of petroleum. This was held to save the first count of the declaration. In the same case and in the second count of the declaration it was charged that the defendants conspired to destroy the plant and business of the plaintiff and did by threats and unfair means oblige persons owning and producing oil who had formerly been the customers of the plaintiff to ship their oil by other means of transportation than those of the plaintiff. This count omitted to state that the defendants were also engaged in the business of buying and transporting oil as competitors. The Court says:

"While the first count does, the second count does not, state "that the defendants were engaged in the business of buying "refining and transporting oil as competitors with the plaintiff "*and thus present a justification for their action*, but simply "charges that they interfered unlawfully and maliciously with "the plaintiff's business with malign purpose to destroy it "This, I think, is a legal cause of action. * * * Every "one has a right to enjoy the fruits of his own enterprise, in "dustry, skill and credit. He has no right to be protected "against skill and competition, but he has a right to be free "from malicious and wanton interference, disturbance and an "noyance. If disturbance and annoyance come as a result o "competition or the execution of like rights by others, it is *dam "num absque injuria* unless some superior right by contract o "otherwise is interfered with, but if it comes from the mer "wanton or malicious acts of others without the justification o "competition or the service of any interest or lawful purpose "then it stands on a different footing and the wrong is actio "able. *Walker vs. Cronin*, 107 Mass., 555; *1 Eddy Trade Comb* "Sec. 480."

Again for example: The case at bar shows that those wh gave the associated defendants their whole patronage, namely those who do not patronize their competitor, the Journal, o tain better rates and better terms, as in the reported case

Dueber Watch Case Co. vs. E. H. Watch & Clock Co., decided by the Circuit Court of Appeals of the second circuit on March 5th, 1895, and reported in 66 Fed. Rep., 637, where the defendants were alleged to have committed unlawful acts and entered into unlawful combination to refuse to sell their goods to persons who bought or dealt in plaintiff's goods to the injury of the plaintiff's trade, etc. The Court said:

"An individual manufacturer or trader may surely buy "from or sell to whom he pleases, and may equally refuse to buy "from or to sell to anyone with whom he thinks it will promote "his business interests to refuse to trade. That is entirely a "matter of his private concern with which governmental pater- "nalism has not as yet sought to interfere except when the prop- "erty he owns is 'devoted to a use in which the public has an in- "terest'; and such public interest in the use has as yet been "found to exist only in staple commodities of prime necessity. "*Munn vs. Illinois*, 94 U. S., 113; *Budd vs. N. Y.*, 143 U. S., 517; "12 Sup. Ct. Rep., 468. It is a business device probably as old "as business itself to seek to increase the number of one's cus- "tomers and the extent of their purchases by treating more fav- "orably those who become exclusive customers. Certainly there "is nothing unlawful or unfair in the statement to the trade by "the maker of any kind of merchandise, 'My goods are for sale "only to those who will buy from me exclusively, not to oth- "ers.' And the case is in no way different if a half a dozen "individuals combine into a partnership or an hundred individ- "uals combine into a corporation and adopt the same method to "enlarge their business. If this be so—and no authority to "which we are referred holds to the contrary—it is difficult to "see in what respect it is unlawful for a score of different manu- "facturers to enter into a like arrangement to push the sales of "their own goods or to secure some business benefit to them- "selves by increasing the number of their exclusive customers "when there is nothing to show that the parties so combining "constitute substantially all or even a majority of the manufac- "turers of such goods even in the half dozen states where their "factories are located and when the field for manufacture is "open to all. It is not an unlawful business enterprise for sell- "ers to seek to secure the entire trade of individual buyers and "an agreement between sellers who wish to confine their deal- "ings to such buyers only, not to sell to others, is not an unfair "or unreasonable measure of protection for such trade."

Apply this to the charge that all advertisers who pay the Journal its increased rates will only be permitted to advertise in the other three newspapers on condition that they advertise in all three of the others and pay like increased rates.

Again for example: On an indictment against several charging that they "did unlawfully agree, combine, conspire, confederate and engage in a conspiracy against trade, creating a trust by the combination of their capital, skill and acts," as in the case of *In re Grice*, 79 Fed. Rep., 627, the Court said: (p. 643.)

"The right to combine to form partnerships and joint stock "associations, the right to agree as to prices and productions; "the right to fix prices, to raise and lower them as business men "may require—is not oppressive to the public nor unjust to "the individual nor contrary to public policy. It is an essential "right as part of the liberty of the citizen of which no legisla- "ture can deprive him. If an ordinary business partnership is "rendered criminal by the act no further argument is neces- "sary."

The decision in this case was reversed in 169 U. S., 284; 18 Sup. Ct. Rep., 323, but not on any ground affecting the correctness of the proposition above quoted.

We also stand upon this proposition and maintain that it cannot be gainsaid, that an ordinary business partnership is rendered criminal by the Wisconsin Act of Section 4466a as interpreted by the Supreme Court of Wisconsin. It is true that if malice is a question of fact in the construction of this statute, a question which we will come to hereafter, the jury may find that a partnership was not formed maliciously and the partners may luckily be acquitted, but this cannot save the statute because as we have said before, no man should be said to hold these rights essential to liberty at the whim of any tribunal authorized to inquire into the intention with which he exercised them. Quoting further from the opinion: (p. 643.)

"That it is so most clearly appears from the concluding por- "tion of Section 1 by which two or more persons are forbidden "to unite any interest that they may have in connection with "the sale or transportation of any article or commodity that is

"price might in any manner be affected. Two village grocers "doing business at a loss to both could not form a partnership "in order to save both from bankruptcy. Neither could they "form a partnership in order that they might lessen their ex- "penses and thus reduce the price of their commodities to the "public. Still more if A and B, each owning half a carload of "potatoes, should agree to ship together in order to obtain car- "load rates, thus enabling them to sell lower in the markets, "they would violate this act. Not only under this act is it im- "possible for citizens to enter into the simplest partnership "without violating it, but they cannot enter into a joint stock "association or corporation, for that precludes competition be- "tween those combined. And this forms so necessary a part of "the daily business affairs of men that its prohibition would in- "terfere with and prevent business as now conducted and con- "sequently to make that criminal is to interfere with the lib- "erty of the citizen."

Observe that in the case last quoted from the law forbade any combination or co-operation between persons carrying on business which might prevent competition, but went too far in that direction, while in the case before this Court the law forbids any combination or co-operation which might affect injuriously and in the way of trade competition an existing business.

Again for example: Where two or more persons conspired to dispose of their property fraudulently so as to hinder and defeat their general creditors whereby the latter lost their demand or debt as in *Adler vs. Fenton*, 24 How., 407 to 413, this Court said:

"To enable the plaintiffs to sustain an action on the case "like the present it must be shown that the defendants have "done some wrong, that is, have violated some right of theirs "and that damage has resulted as a direct and proximate conse- "quence from the commission of that wrong. The action cannot "be sustained because there has been a conspiracy or combina- "tion to do injurious acts."

Here there was a combination or conspiracy and there was loss, but the plaintiffs were general creditors, having no lien upon or legal right in the property conveyed away, and there

being no legal right of the plaintiffs violated by the act of the defendants there was merely *damnum absque injuria*.

Again for example: Where a plumbers' association agreed to withdraw its patronage from all wholesale dealers who would sell to any who were not members of the association, as in *MacCauley vs. Tierney*, 37 L. R. A., 455, the Court said:

"It is doubtless true, speaking generally, that no one has a "right intentionally to do an act with the intent to injure an- "other in his business. Injury, however, in its legal sense, "means damage resulting from a violation of a legal right. It "is this violation of a legal right which renders the act wrong- "ful in the eye of the law and makes it actionable. If, there- "fore, there is a legal excuse for the act it is not wrongful even "though damage may result from its performance. The cause "and excuse for the sending of the notices, it is evident, was a "selfish desire on the part of the members of the association "to rid themselves of the competition of those not members with "a view to increasing the profits of their own business. The "question then resolves itself into this: was the desire to free "themselves from competition a sufficient excuse in legal con- "templation for the sending of the notices? We think the ques- "tion must receive an affirmative answer. Competition, it has "been said, is the life of trade. Every act done by a trader for "the purpose of diverting trade from a rival and attracting it to "himself is an act intentionally done and insofar as it is suc- "cessful, to the injury of the rival in his business, since to that "extent it lessens his gains and profits. To hold such an act "wrongful and illegal would be to stifle competition. Trade "should be free and unrestricted, and hence every trader is left "to conduct his business in his own way and cannot be held "accountable to a rival who suffers a loss of profits by any- "thing he may do so long as the methods he employs are not of "the class of which fraud, misrepresentation, intimidation, co- "ercion, obstruction or molestation of the rival, or his servants "or workmen, and the procurement of violation of contractual "relations are instances."

Observe that Courts may differ as to what constitutes intimidation, or coercion, but there is no such question in this case. What the defendants are charged with doing is offering business advantages to those patrons who refuse to deal with their competitor at the advanced prices of their competitor, thus securing to themselves the exclusive patronage of all those

who leave their competitor, the Journal, by reason of its advance in prices.

Observe further that the case last cited states that to hold such an act wrongful or illegal would be to stifle competition, which is our claim in the case at bar, and if this is correct it decides the case at bar because the legislature of a state cannot stifle competition without interfering with liberty, and it cannot interfere with liberty without coming within the scope of the Fourteenth Amendment of the Federal Constitution. Elsewhere in this brief we present the question of the entire lack of public interest in the acts charged against the defendants. In fact public interest is rather advanced than hindered by the acts charged.

Again for example: Where persons in the same business concerted, associated, mutually agreed, and conspired if you will, that they would not deal with any manufacturer or wholesale dealer who would sell lumber directly to consumers at any point where a member of the association was carrying on a retail lumber yard, this was held lawful and proper in *Bohn Mfg. Co. vs. Northwestern Lumbermen's Association*, 21 L. R. A., 337. It seems to us that the right to do the things above asserted goes much farther than the mere association of the defendants in this case to refuse the use of their columns (except upon condition) to advertisers who are willing to pay their competitors its increased price. In the case last cited the Court said:

"The case presents one phase of a subject which is likely to "be one of the most important and difficult which will confront "the Courts during the next quarter of a century. This is the "age of associations and unions, in all departments of labor and "business, for purposes of mutual benefit and protection. Con"fined to proper limits both as to end and means, they are not "only lawful, but laudable. Carried beyond those limits they "are liable to become dangerous agencies for wrong and oppres"sion. Beyond what limits these associations or combinations "cannot go without interfering with the legal rights of others is "the problem which in various phases the Courts will doubtless "be frequently called to pass upon. There is perhaps danger "that influenced by such terms of illusive meaning, as 'monop-

"'olies,' 'trusts,' 'boycotts,' 'strikes,' and the like, they may be "lead to transcend the limits of their jurisdiction and like the "Court of King's Bench in *Bagg's Case*, 11 Coke, 98a, assume "that on general principles they have authority to correct or "reform everything which they may deem wrong, or as Lord "Elsmere puts it, 'to manage the state.' * * * There was "no element of fraud, coercion or intimidation either towards "plaintiff or the members of the association. True, the secre- "tary in accordance with Section 3 of the by-laws made a de- "mand on plaintiff for 10 per cent. on the amount of the two "sales. But this involved no element of coercion or intimida- "tion in the legal sense of those terms. It was entirely optional "with plaintiff whether it would pay or not. If it valued the "trade of the members of the association higher than that of "non-dealers at the same points, it would probably conclude to "pay, otherwise not. * * * The mere fact that the pro- "posed acts of the defendants would have resulted in plaintiff's "loss of gains and profits does not of itself render those acts "unlawful or actionable. That depends on whether the acts are "in and of themselves unlawful. 'Injury,' in its legal sense, "means damage resulting from an unlawful act. Associations "may be entered into the object of which is to adopt measures "that may tend to diminish the gains and profits of another, "and yet so far from being unlawful they may be highly meri- "torious. *Com. vs. Hunt*, 4 Met., 111; 38 Am. Dec., 346; *Mogul "S. S. Co. vs. McGregor*, L. R. 21; Q. B. Div., 544. If an "act be lawful—one that the party has a legal right to do—the "fact that he may be actuated by an improper motive does not "render it unlawful. As said in one case, 'the exercise by one "'man of a legal right cannot be a legal wrong to another'; or as "expressed in another case, 'malicious motives make a bad case "'worse, but they cannot make that wrong which in its own es- "'sence is lawful.' *Heywood vs. Tillson*, 75 Me., 225; 46 Am. "Repts., 373; *Phelps vs. Nowlen*, 72 N. Y., 39, etc. * * * "What one man may lawfully singly do two or more may law- "fully agree to do jointly."

The last observation is, of course, by the subject under discussion, applicable to and limited to trade competition and combinations for that purpose, and necessarily so because there can be no competition, and indeed no trade, without co-operation and combination.

The foregoing cases present under a variety of circumstances rulings and observations of Courts upon the related questions of *damnum absque injuria*, combination in trade,

competition and liberty to contract and carry on trade and business. Many other cases could be cited to like effect. But we stop to inquire at this point: In what way and to what extent has the statute in question (Section 4466a, Statutes of 1898) altered these rules of the foregoing cases?

II.

Omitting provisions of the statute in question not counted upon in the information in this case we find that the statute includes in its interdict all persons who combine or associate for the purpose therein stated. No matter whether the means employed by such persons be lawful or unlawful, authorized or unauthorized, acts they have a legal right to do, or acts they are compelled by law to do, because the question of means is wholly taken out of consideration by the general words of the statute, "by any means whatever." The statute in question was evidently written from the view point of the well-known, much quoted saying, that a conspiracy is a combination of two or more persons to do an unlawful act by any means or to do a lawful act by unlawful means." The effect of adding the words, "by any means whatever," was perhaps different from what the draftsman of the law expected or suspected. The statute as now written covers only conspiracies where the object or purpose of the combination is unlawful. What objects or purposes are to be considered unlawful *is not stated in the statute except by these words: "Wilfully or maliciously injuring another in his trade, etc."*

Obviously if we were obliged to go to the common law to ascertain what acts shall be considered "wilfully or maliciously injuring another in his trade," the information in this cause would state no offense and would be subject to demurrer within the foregoing quoted and indeed within all the authorities, because by the common law

(a) It was not an *injury* to attract away one's customers by offering or what is the same making it to his disadvantage to deal with one's competitor and so secure his whole patronage.

(b) It was not an injury for several to combine to do this because combination and co-operation are necessary and essential elements of all trade and all competition.

(c) The common law did not hold one responsible for the ulterior motives with which he exercised a legal right.

(d) At common law malice was never inferred from the commission of an act which the party had the legal right to commit.

Now let us see what our information charges. (Record, pp. 16, 17, 18.)

First—It charges in the words of the statute that the defendants did unlawfully conspire, etc., for the purpose and with the intent of wilfully and maliciously injuring the Journal Company and its stockholders without in this sentence in any way showing of what the injury consisted. This, of course, standing alone would have been insufficient. Bishop Stat. Crimes, 2nd ed., Sec. 447.

Second—The information then goes on to show that the three persons accused were business managers of three corporations and that said three corporations were engaged in competition with the Journal and with one another in the business of publishing newspapers and *receiving advertisements for hire*. They are all at Milwaukee. It is the business and trade of the Journal Company to "solicit, receive, print and publish in said newspaper for hire advertisements for merchants and other persons," and it had a large number of advertisers or patrons from whom a large portion of its revenue was derived and it therefore for reasons given which no doubt seemed sufficient to it raised its prices or advertising rates about 25 per cent. over former prices.

The Evening Wisconsin was also a newspaper in the same field of business, "advertising for hire." (p. 17.) The Milwaukee Sentinel was also a newspaper in the same field of business and "advertising for hire." (p. 17.) The Daily News was also a newspaper in the same field of business and "advertising for hire." (p. 17.)

The three business managers of these competitors met on

April 5th, 1900, and agreed, *and we are now informed for the first time in the information what the purpose of the combination was and what the "injury" was.* The accused are charged with agreeing, etc., that *if any person should pay or agree to pay the Journal Company the increased rate of advertising established or fixed by it, then and in such case such person should not be permitted to advertise in any of said other three papers.*

Suppose the agreement stopped right here or the information stopped right here, would it state any offense at common law? Could not the defendants as in the cases hereinbefore cited combine their property, their business advantages or their talents and say to all the world, "We will only receive 'advertisements for hire' from those who give us their whole patronage"? If they could do so, (having one competitor), is it not a mere equivalent to say that they will not receive "advertisements for hire" from any merchant or other person who patronizes this one competitor? Is not this done every day in trade and in the professions? Was not this and more than this done and declared to be lawful in the Mogul S. S. Co. case supra? But the information shows that the accused in the case at bar did not carry their competition so far. It can hardly be claimed that if they had the right at common law to singly or together close their columns absolutely to all who would patronize the Journal, they did not possess the lesser right to close their columns absolutely *to a certain class only of those who patronized the Journal, viz.:* such of the Journal's customers who paid it the recently advanced prices? But the information shows that the accused did not carry their competition even thus far. They did not, as they might have done, agree to close their columns *absolutely* to those of the Journal's patrons who paid or agreed to pay its advanced prices, but only conditionally. That is to say the three associated newspapers would not make contracts of "advertising for hire" with that class of the Journal's customers as were willing to pay the Journal its advanced prices unless such customers would also advertise in the three associated or combined newspapers and pay there-

for at the Journal's rates. We submit that this was entirely within the common law by all the authorities and that the information showed no offense committed. But as we understand the decision of the Supreme Court of Wisconsin in this case on habeas corpus that Court *could not see that this particular form of competition would be beneficial to the three combined newspapers* and therefore inferred malice (either as matter of fact or law as we shall discuss hereafter) and so brought the act in question within the statute in question as a sort of malicious competition or a malicious combination. The inquiry here again separates into two lines, which we must separately pursue.

1. Can there, from the face of the information, be derived any legitimate purpose of competition from the acts of the accused?

2. If this Court is able to say, from the information alone without here considering the plea, as the Wisconsin Supreme Court said in the habeas corpus case, that there could be no competitive purpose served by the acts charged against the defendants, still can the defendants by law be deprived of their liberty to contract collectively or individually with whom they choose and at what rates they choose and upon what terms they choose, including terms which prohibit, either absolutely or conditionally, their customers from dealing with a competitor

III.

First.

Can there be from the face of the information derived any legitimate purpose of competition?

Because the statute in question, Section 4466a, does not add anything to the common law by specifying or defining what acts shall constitute malicious injuries to "his reputation, trade etc."; but merely forbids combination for that purpose, we can look nowhere but to the common law to ascertain not only what acts constitute malicious injuries to reputation or trade, but also to ascertain what acts are authorized by the common law

in the exercise of trade competition, for if the acts under consideration are authorized by law they *cannot at the same time be malicious injuries.* That is, they cannot at the same time be authorized and unauthorized by law.

The Supreme Court of Wisconsin seems to have been misled by the fact that the tendency of the agreement or concert for which the accused are prosecuted is to reduce prices. That Court refused to believe or infer that the defendants could have been influenced by philanthropic motives and rather jumped at the conclusion that there are only three classes of motives, namely: selfish, philanthropic, or malicious. From a narrow and inexperienced view of trade relations the Court found no sufficient selfish motive and refusing to believe there was a philanthropic motive readily came to the conclusion that there must have been a malicious motive. This, of course, does not follow at all. Motives are more multiform and less capable of classification. This is illogical as presuming guilt. That is the Court cannot see any good in the way of competition and because it cannot, it infers malice, that is to say, it infers guilt.

This malice in fact or malevolent intent is inferred from an act not forbidden by law, and from an act which caused loss, not injury, and which the Court holds only was unlawful because it was malicious and only malicious because it did no good to the accused and caused loss to a third person.

Observe that malice figured out in this way is "malice in fact," and not the malice which the law infers from the wilful commission of an unlawful act. But notwithstanding the decision of the Supreme Court of Wisconsin we respectfully submit, that the fact that the tendency of the concert or agreement of defendants was to reduce prices, has nothing to do with the question here under discussion, except, perhaps, to show, [to borrow a phrase from Blackstone], there was no "public wrong." How can it be made the basis of the inference of malice, hence of the inference of guilt, that the tendency of the concert or agreement charged was to reduce prices? In order to arrive at this conclusion we must assume that the Journal will recede from its prices. Is it not more correct to state it in

this way: The object of the combination or concert charged was to win away from the competitor, the Journal, and to the associated three newspapers, all its customers who required more than one newspaper in which to do their advertising or to whom the offer of the three associated defendants was more attractive for any conceivable reason than the offer of the Journal at its increased rates. It is altogether erroneous, we submit, in treating this question to begin with a guess or surmise or deduction that the motives of the associated three defendants were not selfish and were malicious because the Journal would reduce its prices and therefore the prices of advertising on the whole go back to the old basis. It is altogether erroneous to assume, as the Wisconsin court did, that the advertisers who left the Journal would not go into the associated papers. If they did not intend to go into one or more of the three associated papers they would not be affected by the agreement of the defendants at all, but would continue with the Journal. We submit that the inquiry rather is, Was the object of the association of the three accused lawful without first regarding motives? If found lawful no necessity for inquiry into their motives exists. Did the accused have the right at common law, all being competitors, to associate together and refuse to let their columns for hire to each and all advertisers who did not deal with them exclusively? The authorities heretofore cited seem to say that they had that right. If they had that right did it follow that they could not do what is the same thing put in other words, namely: singly or jointly refuse the use of their columns absolutely to anyone who patronized any competitor or a designated competitor? We understand that the authorities are uniform that they had that right. We do not understand that the Supreme Court of Wisconsin denies this right to contract with whom they please and on what terms they please even without reference to competition. Because in *State ex rel. vs. Kreutzberg*, 114 Wis., 530, where a statute under consideration and there held unconstitutional made it a misdemeanor for any person or corporation to discharge an employee

"because he is a member of a labor organization," that Court said, at pages 545, 546, op:

"Confining ourselves then to the act so charged and the "statutory prohibition involved, is it within the legislative "power to make criminal the refusal to contract with another "for his labor *for any reason the employer deems cogent*"?

The Court answered this self-imposed question in the negative. So that recognizing the right of the accused to contract with whom they please and to refuse to contract with whom they please, that Court because it believed the tendency of the contract is to reduce prices and because it could not credit the accused with philanthropic motives assumed that there could be no benefit in the way of trade to the accused from their association and that therefore their action was malicious in fact and therefore unlawful and criminal. This is the real decision of the Wisconsin Supreme Court and it is unconstitutional as interfering with the liberty of contract not only by the decisions hereinbefore quoted, but by the decision of that same Wisconsin Supreme Court in *State ex rel. vs. Kreutzberg*, 114 Wis., 530. But before going any further along this line *and while denying that it is at all a proper inquiry in the case at bar*, let us instance some of the decisions and some of the dicta of Courts which go to show that there is a proper and lawful competitive motive in imposing a burden or differential against those customers who patronize a competitor, or what is the same thing, in offering lower prices, or any other advantage to those customers who give the associated traders their sole patronage.

First is the case of *People vs. Gillson*, *supra*, which shows that a statute is not valid which restrains one in the free enjoyment of his faculties which he ought to have the right and liberty to use in the way of creating or adopting plans for the increase and growth of his trade, business or occupation. Also suggests that a trader may sell at a loss in good faith in order to create a demand for an article out of which demand he will make a profit in the future. Also that he may give away one article and receive his profit or remuneration in some other direction or from some other article in which he deals or trades.

This is much stronger than what we claim for the accused in the case at bar. They are publishing newspapers and selling advertising for hire. Suppose there were no other feature in the case. Have they not a right to make themselves favorably known to the community and advance their interests along other lines by advocating and compelling lower prices for advertising? Or take another case: *Steamship Co. vs. McGregor, supra.* There the effort was to drive the competitor out of trade and to acquire the whole trade to the defendants. Suppose the Journal could not compete with the associated defendants at the old rates and their combination to reduce the rates of advertising for hire would result in such loss to the Journal that its competition would be utterly destroyed and its publication suspended, would they not have a right to do so under the case last cited?

Again, take the case of *Anderson vs. U. S., supra.* There the parties associated together for the purpose of refusing to trade at all with or recognize certain competitors and to refuse all business relations with them unless they joined the association and became members. In the case at bar, unless they refused to accede to the raised prices of the Journal. What is the difference?

See also *Scottish, etc., vs. Glasgow Fleshers, etc.*, 35 Scot. L. R., 645.

Again, take the case of *Bowen vs. Matheson, supra.* Greater damage the Journal could not have from this association than to destroy its trade utterly. That is not claimed in the case at bar, but, says the Court in *Bowen vs. Matheson, supra* (503 cp.):

"If their effect is to destroy the business of shipping mas-
"ters who are not members of the association, it is such a re-
"sult as in the competition of business often follows from a
"course of proceeding that the law permits. New inventions
"and new methods of transacting business often destroy the
"business of those who adhere to old methods. Sometimes as-
"sociations break down the business of individuals, and some-
"times an individual is able to destroy the business of asso-
"ciated men."

Or, take the case of *Ducber Watch Case Co. vs. E. H. Watch & Clock Co., supra*, where it is said (p. 645):

"It is a business device probably as old as business itself to "seek to increase the number of one's customers and the extent "of their purchase by treating more favorably those who be- "come exclusive customers. Certainly there is nothing unlaw- "ful or unfair in the statement to the trade by the maker of any "kind of merchandise, 'My goods are for sale only to those who "'will buy from me exclusively, not to others.' And the case "is in no way different if a half a dozen individuals combine "into a partnership."

Also consider the cases cited in this brief *supra* as instances of acts of trade competition sanctioned by the Courts.

In order to understand the advantage to the accused from the association and agreement set forth in the information, it is necessary to consider the nature of the business of advertising for hire. From the viewpoint of the advertiser who may be called the trader it is desirable to bring to the attention of the greatest number of persons eligible as customers for his particular line of trade at the minimum of expense, the fact that he is in trade, the location of his place of business and the advantages of trading with him growing out of the cheapness of his prices, the quality of his goods, convenience of access, or any other advantage he may offer, including prizes and discounts for exclusive patronage.

The advertising trader has to consider not alone the circulation of the newspaper or newspapers which he employs (although that is an important factor), but the nature of his business with reference to the class who read a particular paper or group of papers, and in the case of two or more newspapers whether or not they cover the same or different classes of readers, for he knows that the same class of readers is not reached by the St. James Gazette and the Daily Mail, nor by the New York Sun and the New York Journal, nor by the Review of Reviews and Munsey's. He also knows that papers, republican in politics, are usually read by republicans, democratic in politics, read by democrats, and labor newspapers by

members of labor organizations, and that the various religious sects and some nationalistic factions in this country have their newspapers in which each sect, race or faction has great confidence and that class of citizens can ordinarily be reached by an advertisement only through its particular newspaper. He knows there are a few newspapers more generally taken which to some extent circulate among all classes of readers, but at the same time no one paper reaches all classes. Turning to the field of advertisers, we find all the kinds of trades represented, the sale of proprietary medicines, shoes, clothing, food stuffs, jewelry, dry goods, horseshoeing, places of amusement, situations wanted, certain kinds of professional work, and, in short, the whole various and kaleidoscopic field of trade. A few general stores, like the few newspapers of quite general circulation, offer to cover by their sales more of the great army of human wants than other advertisers, but none pretend to cover all. The advertising trader knows further that it would be quite a waste of money to advertise overalls in a newspaper read mostly by the wealthy and leisure class, or to advertise diamonds or champagne in a labor newspaper. And if he is selling a special or particular line he knows that his customers must be sought from among the readers of more than one newspaper *because the classification of newspaper readers is never coincident with the classification of eligible customers* with reference to any trade and if he is in a more general trade, such as the dry goods line where the one touch of nature makes the whole feminine world kin, he must, for illustration, be content with bringing his business to the notice of a fraction of the community unless he advertise in the republican as well as in the democratic daily and in the labor newspapers as well as in the socialistic and to some extent at least in the newspapers representing and read by religious sects. From the viewpoint of the newspaper proprietor, or what is the same thing, the servant of the newspaper proprietor, it is desirable to present to the advertising trader, his patron, the greatest number of the foregoing desirables at the lowest possible price and thus secure as much patronage as possible. He knows that his newspaper alone

reaches only a certain class of readers and that the number of possible patrons is limited and the greatest variety exists both in the kind of articles and services advertised.

Now it is a mistake to consider that the contract of advertising for hire made with a newspaper is necessarily or even usually for any fixed period, or that it is continuous. The prices per inch of space are continuous, but the advertising trader inserts a variable number of inches in various newspapers, that is on one day he will advertise in newspaper A and on the next day in newspaper B, on the third day in newspaper C, on the fourth day in newspapers A and C, and on the fifth day in all three, and so on. In view of these conditions, what trade advantages could accrue to the three associated newspapers accused from the agreement set out in the information? Let us submit here that any one single trade advantage is sufficient and that the inquiry is not what advantages are certain to accrue, but what advantages are possible. First and simplest is the question of the number of readers which the three associated newspapers can present to the advertising trader. If the total circulation of some one of the associated newspapers was less than that of the Journal competitor, but the combined circulation of the three associated newspapers were equal to or greater than three times the circulation of the Journal, there is a direct offer to the advertising patron to reach three times the number of people with his advertisements at 25 per cent. less cost per capita. Also if the circulation of each one of the three associated papers were less than that of the Journal, but putting all their circulation together, it amounted to only 10 per cent. less than three times the circulation of the Journal, the agreement set forth in the information offers to the advertising patron a reduction in the cost of advertising per capita of readers, of 15 per cent. In both the foregoing cases it presumably secures the patronage to the accused.

If this is a proper subject of inquiry by the court, we submit that the foregoing is a sufficient trade advantage and that where the readers of the three papers constitute the requisite variety of classes or sects the agreement charged is mutually

beneficial to the three accused and to the advertising trader. To the former in securing patronage and to the latter in securing the variety of readers that he desires.

Second—To the advertising trader who desires to advertise only in one newspaper it offers him a saving of 25 per centum and tends to secure his patronage to some one of the associated newspapers rather than to the Journal. This, we submit, is sufficient alone. It forces the selection of one of the accused by the lower price in all cases except where by reason of a supposed greater reading constituency by at least 25 per centum the advertiser might select the Journal.

Third—To by far the larger class of advertising traders who desire to have an advertisement appear one day in one newspaper, the next day in a different newspaper, and the third day in still another, so as to reach different classes of readers, the agreement described in the information is a direct inducement to select his several papers from among the three associated newspapers and so save 25 per centum and the patronage which otherwise would have been divided between four newspapers, each securing approximately one-fourth, is now divided between three newspapers, each securing approximately a large fraction, or one-third. This alone is sufficient interest. This result would not be possible without the provision in the agreement that those who select the Journal shall not be permitted to advertise in either of the other papers unless he advertise in all.

Fourth—The agreement set forth in the information is an inducement to the advertising trader to select any two of the associated newspapers rather than the Journal and one of the associated newspapers, and also an inducement to select the three associated newspapers rather than the Journal and any two of the associated newspapers and thus secure to each of the associated newspapers a greater volume of patronage by the difference between one-third and one-fourth of all the last class of patrons. This alone is sufficient.

The agreement is based upon the supposition, of course, that the Journal will persist in its raise of rates. It was to meet

and take advantage of this business mistake on the part of the competitor that the agreement was made and there is no provision made for the Journal going back to the old prices because in that event the association on the lines laid down in the information would be nugatory and also impossible. That the agreement or association charged was efficacious to secure to the accused additional trade is also shown by the information, where it is stated that several advertising traders left the Journal. Presumably they did not retire from business or go into a monastery, because under the agreement charged they had no reason to quit the Journal unless they desired to go into one or all of the associated newspapers. To the advertising trader who did not so desire the agreement charged had no force or effect whatever.

Fifth—It is, or at least they may honestly think it is, to the interest of the associated newspapers that the prices of advertising for hire should not be raised too high so as to decrease the volume of newspaper advertising or divert it into other modes of advertising and as from motives of class interest associations of lawyers fix and regulate fee bills, associations of laundrymen regulate laundry charges, associations of laborers fix upon the wages they will demand, and associations of insurance companies, manufacturers, and, in short, all traders fix upon rates, so the associated newspapers had an interest in fixing rates so as to benefit themselves or their trade and were well within their rights by excluding from their concert or association each and all who charged higher rates. (*Allgeyer vs. Louisiana, infra.*) To sum up on this point so far as covered by the foregoing:

The information shows that a competing newspaper, the Milwaukee Journal, raised its advertising rates about 25 per centum above its then existing rates. Three competitors refused to raise their advertising rates and met their competitor's raise of prices by adhering to and offering the trade their service and their columns at the old rate, except that all advertisers who paid or agreed to pay the Milwaukee Journal its recently increased rates should have their advertisements ac-

cepted by the three associated newspapers in case such traders desired to advertise in any of the three associated newspapers only upon condition that such traders advertised in all the other three associated newspapers and paid to each a corresponding advance in rates. It will be observed that this agreement concerned property impressed by no public use, that it concerned only what private persons could do or refuse to do with their own private property, that no question of public health, morals or welfare was affected thereby, that it was done in the exercise of trade competition, that its tendency was to keep prices down, or in the alternative secure to the person making the agreement a larger proportion of the advertising trade, that it is impersonal in its aim and directed only against a policy, that it was done to injure a competitor only in that sense of the word "injure" which covers causing a loss of custom by winning away its customers, and that only in case the competitor persisted in its attempt to raise prices that advertising traders were still left free as before to select and bargain with either or all the newspapers except that it was more advantageous to said advertising traders to select one of the associated three newspapers instead of the Journal, two of the associated three newspapers instead of the Journal, and one of such associated papers, and the three associated newspapers instead of the Journal and two of such associated newspapers, thus offering a direct discount or advantage to all those advertising traders who did either of the three last mentioned things, and so securing their patronage to be distributed among the three associated newspapers.

Lastly we desire to present a phase of this matter which seems to us to show with a certainty quite equal to mathematical demonstration the advantage to the accused of the trade arrangement.

The trade advantage to the three associated newspapers arising from their refusal to contract with any person who employed the Journal and paid its increased rates, except upon condition that such person employed all the three associated newspapers and paid each at a rate equal to the Journal's rate,

was direct, immediate and certain. This requirement or condition was not addressed to and could not affect in the least the action of any customer or patron of the Journal who had no desire to also employ one or more of the associated newspapers. Neither was it addressed to nor could it affect in the least in causing him to leave the Journal the action of those advertising traders who *required* four or more newspapers. This last class of advertisers was in nowise affected because *requiring* four they must perforce patronize all three associated newspapers and also the Journal and would be charged by each at the same rate. It therefore was addressed to and affected the action of *only those advertising traders who desired to advertise in two or three newspapers.* By the terms of the proposition all who desire less than two and all who desire more than three are entirely unaffected. Now to this last class of advertisers who desire two or three newspapers the agreement of the accused offered the advantage of a lower rate if such advertisers would *select their two or three newspapers from the associated newspapers.* Presumably experience warranted the accused in believing that few if any advertisers would require more than three newspapers. But be that as it may, the foregoing, we respectfully submit, shows with unanswerable precision that the agreement of the accused tended to secure to them the usual trade advantage of the exclusive patronage of a class, presumably the largest class, of advertising traders.

IV.

SECOND.

If this Court is able to say from the information alone (without here considering the plea) as the Wisconsin Supreme Court said in the habeas corpus case, that there could be no competitive purpose served by the acts charged against the accused, still can the accused by law be deprived of their liberty to contract, collectively or individually, with whom they choose and at what rates they choose and upon what terms they choose, including terms which prohibit either absolutely or conditionally their customer from dealing with their competitor?

This turns upon the question whether there is secured to the citizen by the constitution the right of *freedom of contract with whom he pleases and to refuse to contract with whom he pleases without giving any reason therefor.* We maintain that there is such constitutional right and that without going to this extent there is no such thing as liberty to contract. We distinguish the strike and boycott cases where the alleged wrongdoer is not merely exercising a right to contract or to refuse to contract himself, but goes out to the public and to persons with whom he has no contract relations and threatens, coerces or even persuades such persons not to deal with or patronize another whom he thereby seeks to coerce into some particular course of conduct. We shall take up this latter class of cases in another section of this brief. In that class of cases there is usually no question of the liberty of contract. Because all unlawful strikes and all boycott cases take this form, viz: The interested strikers or boycotters first refuse to continue contract or social relations with the person to be coerced except upon condition that he accede to their demands. So far their action involves the question of liberty to contract or refuse to contract; but so far the Courts hold their action legal. But finding this ineffectual, and only when they find this ineffectual, the strikers and boycotters take a step further and try to prevent by threats or persuasion others from entering into contract or social relations with the person to be coerced. *In favor of this last step in the strike or boycott the striker or boycotter could no more invoke the law of liberty to contract than he could in justification of any other act of his which did not consist in the making of a contract or in the refusal to make a contract.* But we will take up the strike and boycott cases hereafter and here confine ourselves to the question whether liberty to contract involves the right to make or refuse to make lawful contracts without any inquiry into the motive of their making or refusal.

One of the latest cases on this subject is *Coffeyville Vitrified Brick & Tile Co. vs. Perry,* decided May 7, 1904, by the Supreme Court of Kansas and reported in the 76 Pacific Re-

porter, page 848. The statute of the State of Kansas under consideration in this case made it a misdemeanor for any person to prevent employees from joining any labor organization and provided that any person that coerces or attempts to coerce employees by discharging or threatening to discharge them *because of their connection with a labor organization*, should be punished by a fine and also subject to civil action for damages. The Court held this statute unconstitutional, saying:

> "Before approaching a discussion of the question let us exclude any notion that the act in question is a police regulation. It will be observed that it does not affect the public welfare, health, safety or morals of the community or prevent the commission of any offense or other manifest evil. Where the object of the act cannot be traced to the accomplishment of some one of these purposes it is not a police regulation. Besides the legislature has no power to impair or limit the reasonable and lawful exercise of a right guaranteed by the constitution under the guise of a police regulation. * * * The right to follow any lawful vocation and to make contracts is as completely within the protection of the constitution as the right to hold property free from unwarranted seizure or the liberty to go when and where one will. One of the ways of obtaining property is by contract. The right, therefore, to contract cannot be infringed by the legislature without violating the letter and spirit of the constitution."

In *State ex. rel. Zillmer vs. Kreutzberg*, 114 Wisconsin, 530, the statute under consideration was in these words: (Chap. 332, Laws Wis., 1899.)

> "Section 1. No person, corporation, agent or officer on behalf of any person or corporation, shall coerce or compel any person or persons into an agreement, either written or verbal, not to join or become a member of any labor organization as a condition of such person or persons securing employment or continuing in the employment of any such person or corporation and no person or corporation shall discharge an employee *because he is a member of any labor organization.*"

The prosecution under this statute was for unlawfully discharging an employee *because said employee was a member of a labor organization*. The Wisconsin Supreme Court held this

statute unconstitutional and we quote from that opinion, as follows: (pp. 533, 534.)

> "It has become settled, for example, that 'liberty' does not mean merely immunity from imprisonment and that 'property' is not confined to tangible objects which can be passed from hand to hand; that within the former word is included the opportunity to do those things which are ordinarily done by freemen and the right of each individual to regulate his own affairs so far as consistent with the rights of others, and within the latter, those rights of possession, disposal, management and of contracting with reference thereto which render property useful, valuable and a source of happiness, right to pursuit of which is preserved." Citing authorities.

The Wisconsin Supreme Court cites from the decision of this Court in *Allgeyer vs. Louisiana*, 165 U. S., 578, as follows:

> "The liberty mentioned in that (XIV.) Amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or vocation; and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

It is said that in *Carew vs. Rutherford*, 106 Mass., 1, in *Allen vs. Flood*, 1898, App. Cases, 1, and in *Doremus vs. Hennessey*, 176 Ill., 608; 52 N. E. Rep., 924, these several Courts sustain the right of labor unions or labor organizations to contract or refuse to contract with whom they please and that the right of such persons to contract or refuse to contract, or of such organization so to do, was now protected by law. The Wisconsin Supreme Court further said in the case under consideration: (pp. 535, 536.)

> "In the somewhat famous case of *Arthur vs. Oakes*, 11 C. C. A., 209; 63 Federal, 310, wherein the Circuit Court during the labor troubles of 1894 enjoined certain employees *from so quitting * * * as to cripple the property or prevent or hinder the operation of the railroad*, the Court of Appeals, speaking by Harlan, J., held

that was erroneous as invading the natural rights of men. He said: 'It would be an invasion of one's natural liberty to compel him to work for or to remain in the personal service of another.' 'The rule we think is without exception that equity will not compel the actual affirmative performance by an employee of merely personal services any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character.' It was there further held that it was error to enjoin the employees from striking for the reason that included in the meaning of the word 'strike' was the mere concurrence of a number of individuals in the exercise of their inherent right to quit their employment, *which no Court ought to interfere with unless they were bound by contract.*"

The Supreme Court of Wisconsin, and also many of the Courts in the cases hereinafter cited, have quoted with approval the following from Cooley on Torts, page 278:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, *whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice.*"

If this is law then the Supreme Court of Wisconsin has no authority under the XIVth Amendment to the constitution of the United States to *inquire at all into the motives of the associated newspapers for refusing to receive contracts of advertising from any person* who patronized the Journal Company. Accused had the right, according to these authorities, to refuse absolutely to contract. They are charged with refusing conditionally. The condition imposed here was advantageous to the accused, but we leave this out of sight at present.

"With his reasons (for refusing to contract with any par-"ticular person) neither the public nor third persons have any "legal concern." *Cooley on Torts,* p. 278.

Right here we might bring to the notice of the Court the case of *Wallace vs. Georgia, Etc. Railroad Co.*, 94 Ga., 732. There a statute of the State of Georgia required under penalty every incorporated railroad, express and telegraph company which discharged an employee to furnish to said employee in writing the reasons for such discharge. The Court held the

statute unconstitutional. Other reasons were given, but we cit
the case here merely to the point decided therein.

We do not question the right of the legislature or of th
Courts to declare that the motive with which an indifferent ac
is done may be inquired into, but we submit that there can b
no inquiry into the motive with which a legal, constitutiona
right is exercised without denying that right. If the state ca
inquire, for example, into the motive which induced a man t
refuse to make a contract of employment with another man an
punish him for such refusal if the motive accompanying suc
refusal is considered unworthy or malicious, the right to refu
is at an end. It becomes a mere conditional privilege instea
of a constitutional right. That is to say, he will be justifie
in refusing and will not be incarcerated for his refusal only
the tribunal which tries the issues of fact finds that his refus
to contract arose from no unworthy or malicious motive
Every decision of every Court which goes upon the ground tha
the right to make contracts or refuse to make contracts is
constitutional right negatives such contention, and the for
going authorities negative it in express terms.

In *State vs. Julow*, 129 Mo., 163; 31 S. W. Rep., 781; 2
L. R. A., 257, where a statute was held unconstitutional whic
provided, like the Wisconsin statute, that no employer *shou*
by any means attempt to compel or coerce any employee in
withdrawal from any lawful organization or society under pe
alty, the Court said:

"For the present purpose it will be assumed that defendan
"attempted to do the act with which he is charged and that
"lay in his power to compel or coerce Simonds to withdra
"from a lawful organization with which he was connected; b
"cause by so doing all discussion of matters merely prelim
"nary to the main question herein involved will be avoide
"* * * Here the law under review declares that to be
"crime which consists alone in the exercise of a constitution
"right, to-wit, that of terminating a contract—one of the esse
"tial attributes of property, indeed property itself, under pr
"ceding definitions. Brought to the bar of a Court on such
"charge the accused would have been prejudged in so far
"the criminality of the act is concerned. No question cou

"there be made or attempted as to the quality of the act. That "would have been settled by the previous legislative declara- "tion and it would only have remained to find the fact as "charged in order to declare the guilt as charged. But the fact "as charged, as already seen, is not a crime and will not be a "crime so long as constitutional guaranties and constitutional "prohibitions are respected and enforced. If an owner, etc., "obeys the law on which this prosecution rests he is thereby "deprived of a right and a liberty to contract and to terminate "a contract as all others may; if he disobeys it then he is pun- "ished for the performance of an act wholly innocent, unless, "indeed, the doing of such an act, guaranteed by the organic "law—the exercise of a right of which the legislature is for- "bidden to deprive him—can by that body be conclusively pro- "nounced criminal. We deny the power of the legislature to "do this, to brand as an offense that which the constitution "designates and declares to be a right and therefore an inno- "cent act; and consequently we hold that the statute which "professes to exert such power is nothing more nor less than a "legislative judgment and an attempt to deprive all who are "included within its terms of a constitutional right without "due process of law. * * * In conclusion it may be said "that there is a broad distinction between the invasion of a "right conferred by the constitution, to-wit, a right of property "carrying with it, as we have seen, all the liberties, attributes "and coincident rights which go to effectuate the principal "right, and those rights which are the mere creatures of legis- "lative gratuity where the legislature granting a privilege or "bestowing a bounty may of course, as no constitutional right "is involved, prescribe the conditions upon which the privilege "may be exercised or the bounty be obtained. This point finds "ample illustration in the recent cases of *Frisbie vs. U. S.*, 157 "U. S., 160; and *St. Joseph vs. Levin*, 31 S. W. Rep., 101."

In *People vs. Warren*, 34 N. Y. Supp., 942, the defendant was convicted of the crime created by statute of employing an alien as a laborer on contract work of a municipal corporation. The Court held the statute unconstitutional and said (p. 944):

"Personal liberty—that is, the right, among others, to make "contracts, to labor for others and to employ others to labor— "is secured by constitutional law to all members of this state "and the right is inalienable. *Greenhood Public Policy*, Rule "303; *In re Baker*, 29 How. Prac., 485."

Chicago vs. Hurlbert, 68 N. E. Rep., 786, 792 op. same point.

In *Commonwealth vs. Perry*, 155 Mass., 117; 28 N. E. Rep., 1126, the defendant was convicted under a statute which forbade under penalty the imposition of a fine by an employer upon his employees engaged at weaving for imperfections that may arise during the process of weaving. A majority of the Court held the statute unconstitutional on the ground that it infringed the right to acquire, possess and protect property, which included the right to make reasonable contracts which should be under the protection of the law. The dissenting opinion considered that the act of the legislature might be sustained on the ground that such fines were often used as a device to cover dishonest purposes and therefore that the power might be taken away from the employer of imposing any fine. But observe that the right asserted by the employer in that case was a right to make a particular form or kind of contract, while in the case at bar the right is denied to make any contract beneficial to the accused which might cause loss to a competitor if the accused entered upon the exercise of that right with malicious motives.

In *Carew against Rutherford*, 106 Mass., 1, this principle which we are here contending for was applied to protect parties against a conspiracy and to hold the conspirators liable to repay money extorted. In condemnation of the conspiracy the Court in that case said (p. 13):

"We have no doubt that a conspiracy against a mechanic "who is under the necessity of employing workmen in order to "carry on his business to obtain a sum of money from him "which he is under no legal liability to pay, by inducing his "workmen to leave him and by deterring others from entering "into his employment or by threatening to do this, so that he is "induced to pay the money demanded under a reasonable ap"prehension that he cannot carry on his business without "yielding to the illegal demands, is an illegal, if not a criminal "conspiracy; that the acts done under it are illegal and that the "money thus obtained may be recovered back, and if the parties "succeed in injuring his business they are liable to pay all the "damage thus done to him. It is a species of annoyance and "extortion which the common law has never tolerated. This "principle does not interfere with the freedom of business but "protects it. Every man has a right to determine what branch

"of business he will pursue and to make his own contracts with "whom he pleases and on the best terms he can. He may "change from one occupation to another and pursue as many "different occupations as he pleases and competition in busi- "ness is lawful. He may refuse to deal with any man or class "of men. And it is no crime for any number of persons with- "out an unlawful object in view to associate themselves to- "gether and agree that they will not work for or deal with cer- "tain men or classes of men or work under a certain price or "without certain conditions. *Commonwealth vs. Hunt*, 4 Met., "111; *Boston Glass Manufactory vs. Binney*, 4 Pick., 425; "*Bowen vs. Matheson*, 14 Allen, 499."

This covers our claim in the case at bar and it illustrates that the principle is not only a protection against prosecution but a protection against conspiracy of others. If a citizen is to be coerced by powerful combinations into making or refusing to make contracts against his will, he can answer this principle of law to show the illegality of the conspiracy against him; and if, under the guise of a state statute, he is prosecuted for conspiring to refuse to enter into contract relations with any man or body of men he can answer this principle in bar of the prosecution.

All this would be entirely unavailable if this constitutional right of liberty to contract or refuse to contract could be evaded by a statute permitting a judicial inquiry in every case into the intention with which that right was exercised. There is a distinction between different classes of legal rights in this respect. If the right is constitutional *and if it would be destroyed or impaired by an inquiry into the motives with which it was exercised*, then such inquiry is not permissible and is as unconstitutional as an absolute prohibition of the exercise of such constitutional right would be. So that the question in every case of this kind must be, Would a judicial inquiry into the motive with which the right is exercised impair or destroy the constitutional right? If it would, this indirect impairment or destruction is as unconstitutional as an absolute interdict. As is said in *Rideout vs. Knox*, 148 Mass., 368, 2 L. R. A., 81:

"We concede further that to a large extent the power to use "one's property malevolently in any way which would be law-

"ful for other ends is an incident of property which cannot be "taken away even by legislation. It may be assumed that un- "der our constitution the legislature would not have power to "prohibit putting up or maintaining stores or houses with ma- "licious intent and thus to make a large part of the property of "the commonwealth dependent upon what a jury might find to "have been the past or to be the present motives of the owners."

Take for illustration the case of an employer of labor, hostile to labor unions and, it may be, outspoken in his opposition thereunto. We have had notable instances of this recently. Now suppose a statute was enacted making it a crime or misdemeanor for any two or more persons to *wilfully or maliciously* refuse to employ a man because he was a member of a labor union. Would such statute be constitutional? If not, how is the statute in question constitutional and how can it permit an inquiry into motives? According to press reports, at a comparatively recent meeting of the national association of employers the president of that association in his opening address stated his belief that labor organizations were lawless bodies and promoted riots and disturbance. Why could he and his business associates not be prosecuted under this statute by any man who applied to him for work in the State of Wisconsin and who was at the same time a member of any of the denounced labor organizations and why could he not be convicted under this statute?

To hold that this right can only be exercised at the risk of prosecution in all cases and at the risk of conviction if malicious motives are found by the jury also merely points a way in which the constitutional right can be utterly extinguished. Two or more employers of labor choose to have their work done by employees who are not members of any labor union. They reject the proffered services of several labor men who apply to them and they employ instead inferior non-union workmen or they employ equally competent non-union workmen at higher wages than those wages demanded by the union men. Why are these employers not liable to criminal prosecutions under this statute? Upon the facts last aforesaid the Wisconsin Su-

preme Court could not see any advantage accruing to the associated employers from such refusal, hence the refusal must have been malicious and hence the persons refusing guilty, because the injury to the men refused was that they lost, like the Journal, an opportunity to earn money by working for hire, or, say, by "advertising for hire." We submit that a statute producing these result is necessarily unconstitutional and also that it cannot be gainsaid that the statute in question covers every phase of the hypothetical case last set forth. Again, suppose a person opened a grocery store or a livery stable in a residence district in a city where the residents were opposed to having such business carried on in their midst. Then these residents agreed together that for the purpose of inducing the grocer or livery stable keeper to quit business in that neighborhood they would not patronize him but would go several blocks further and even pay higher prices for their groceries or carriage hire to another grocer or livery stable keeper. Would not such residents not be within their rights and also within this statute in question?

V.

STRIKE AND BOYCOTT CASES.

We propose to show in this subdivision by an examination of the leading cases that the strike or boycott becomes an unlawful conspiracy, *not by reason of the refusal of the interested parties to assume or continue contractual relations with the persons to be coerced, which is a legal right*, but by reason of the strikers or boycotters going beyond this and preventing, even in some cases by persuasion, others with whom the strikers or boycotters neither have nor intend to have contract relations, from entering into contract relations with the person to be coerced.

One of the most extreme cases is *Erdmann et al. vs. Mitchell et al.*, 207 Pa., 79; 56 Atlantic Rep., 327; where the plaintiffs, certain laborers, were employed upon a building in course of construction and were not members of the particular labor as-

sociation to which defendants belonged. The defendants *were not working on this building,* but certain other members of defendants' union, who were satisfied with their employment, were so working. The defendants procured the discharge of the plaintiffs from such work by calling a strike and *inducing the members of their organization to quit work* at a critical time, and to the great pecuniary loss of the employer, unless the plaintiffs were discharged. The defendants were held liable, but the Court said:

"It is argued that defendants, either individually or by or-
"ganization, have the right now to peaceably persuade plaint-
"iffs and others not to work and their employer not to hire
"them. So they have. It is further argued that they can quit
"work when they choose. So they can. But neither of these
"suggested cases is the one before us. Here a strike on a large
"building was declared because plaintiffs would not join a par-
"ticular society. The declared purpose of the strike was to
"cause loss of employment to plaintiffs because they would not
"join the Allied Building Trades—chose to remain faithful to
"their own union, the Plumbers' League. The Allied Trades
"would not declare the strike off and permit work on the build-
"ing to proceed until the employers entered into a contract
"practically stipulating that they would discharge the plaint-
"iffs and not re-employ them. * * * The right (of plaint-
"iffs) involved is the right to dispose of one's labor with full
"freedom. This is a legal right and is entitled to legal protec-
"tion. The purpose of these defendants was to force the
"plaintiffs to join the defendants' association and to that end
"they injured the plaintiffs in their business and molested and
"disturbed them in their efforts to work at their trade. It is
"true they committed no acts of personal violence or physical
"injury to property, although they threatened to do something
"which might reasonably be expected to lead to such results."

Gray vs. Building Trades Council, (Minn.) 97 N. W. Rep., 663; is a late case which reviews the authorities and considers conspiracy to boycott. There the plaintiffs were electrical contractors and engineers and the defendant was an association consisting of a number of delegates and representatives from various labor organizations, all of which and each member of which was bound to obey the orders of the defendant on pain of being fined. The defendant undertook to classify the plaintiffs

as "unfair," which meant that all the labor unions or organizations represented by defendant, whether engaged in the same kind of business with the plaintiff or not, would refuse to work for, patronize or contract with, anyone who might employ the plaintiffs, and the defendant threatened the Minneapolis Industrial Amusement Association that in case it employed plaintiffs or contracted with plaintiffs the defendant would see that said last named association would be unable to obtain men for the construction of its buildings. The defendant was held liable and the Court said (p. 666):

"A boycott may be defined to be a combination of several "persons to cause a loss to a third person by causing others "against their will to withdraw from him their beneficial busi- "ness intercourse through threats that unless a compliance "with their demands be made the persons forming the combina- "tion will cause loss or injury to him; or an organization "formed to exclude a person from business relations with oth- "ers by persuasion, intimidation and other acts which tend to "violence and thereby cause him through fear of resulting in- "jury to submit to dictation in the management of his affairs. "Such acts constitute a conspiracy."

Also:

"While the Courts have invariably upheld the rights of in- "dividuals to form labor organizations for the protection of the "interests of laboring classes and *have denied the power to en- "join the members of such associations from withdrawing, "either singly or in a body*, even where such withdrawal in- "volves a breach of contract, yet they have very generally con- "demned those combinations usually termed 'boycotts' which "are formed for the purpose of interfering otherwise than by "lawful competition with the business affairs of others and de- "priving them by means of threats and intimidation of the "right to conduct the business in which they happen to be en- "gaged according to the dictates of their own judgment."

And again (p. 667):

"Labor may organize as capital does, for its own protection "and to further the interests of the laboring class. They may "strike and persuade and induce others to join them; but when "they resort *to unlawful means to cause injury to others* with "whom they have no relation, contractual or otherwise, the "limit permitted by the law is passed and they may be re- "strained."

The case of *Arthur vs. Oakes*, 11 C. C. A., 209; 63 Fed. Rep., 310; also illustrates this principle. Reduced to its simplest terms it may be stated correctly as follows: Upon a petition not disputed in the cause, stating that the railway employees were giving out and threatening that in a certain contingency they would suddenly quit the service of the receivers; by threats, force and violence would compel other employees to quit said service and by organized effort and intimidation prevent others from taking the places of those who might quit and would disable locomotives and cars so that they could not be safely used, etc., etc., a restraining order was issued prohibiting the workmen from doing many things not necessary to be here considered. The working men, by counsel, moved to strike out two paragraphs, or rather two propositions, from said restraining order on the ground that each of said two propositions went beyond the power of the Court to restrain or interdict. The proposition which we will call the first was stricken out on this ground and the proposition here called the second proposition was retained. By these propositions the workingmen were restrained:

"FIRST PROPOSITION.

"From so quitting the service of said receivers, with or "without notice, as to cripple the property or prevent or hinder "the operation of said railroad."

"SECOND PROPOSITION.

"From combining and conspiring to quit, with or without "notice, the service of said receivers with the object and intent "of crippling the property in their custody or embarrassing the "operation of said railroad."

The legal effect of the decision in this case is somewhat weakened by the consideration that the workmen were to be restrained, not convicted, and by the consideration that the railroad was a quasi public corporation and by the consideration that the primary question related to the exercise of the equity powers of the Court. But if the legal right of the parties was determined even when the question was presented in

this way, the decision is of some value in the case at bar. The Court held that the first proposition aforesaid went beyond the power of the Court below. We quote:

"The exercise by employees of their right to quit in conse-
"quence of a proposed reduction of wages *could not be made*
"*to depend upon considerations of hardship or inconvenience*
"*to those interested in the trust property or to the public.*"

With reference to the second proposition the Court considered that by its terms the employees were restrained from entering into a *conspiracy* for an unlawful purpose and on this ground sustained the second interdict. We quote:

"We have said that if employees were unwilling to remain
"in the service of the receivers for the compensation prescribed
"for them by the revised schedules it was the right of each one
"on that account to withdraw from such service. It was equally
"their right, *without reference to the effect upon the property*
"*or upon the operation of the road, to confer with each other*
"*upon the subject of the proposed reduction in wages and to*
"*withdraw in a body from* the service of the receivers because
"of the proposed change. * * * But that is a very differ-
"ent matter from a *combination and conspiracy* among em-
"ployees with the *object* and *intent* not simply of quitting the
"service of the receivers because of the reduction of wages, but
"of *crippling the property* in their hands and *embarrassing the*
"*operation* of the railroad. * * * The general inhibition
"against combinations and conspiracies formed with the object
"and intent of crippling the property and embarrassing the
"operation of the railroad *must be construed as referring only*
"to acts of violence, intimidation and wrong of the same nature
"or class as those specifically described in the previous clauses
"of the writ. We do not interpret the words last above quoted
"as embracing the acts of employees who, being dissatisfied
"with the proposed reduction of their wages, merely withdraw
"on that account, singly or by concerted action, from the service
"of the receivers, using neither force, threats, persecution nor
"intimidation towards employees who do not join them nor any
"device to molest, hinder, alarm or interfere with others who
"take, or desire to take their places."

We have here in one case two propositions decided, and the decision of each is authority, by analogy at least, upon the claim we make in the case at bar. These men were upheld in their refusal to enter into or continue contract relations and in

agreeing together for that purpose, without regard to whether the railroad property or its stockholders or creditors represented by the receivers sustained a loss thereby. Manifestly because the workmen in so doing were exercising a legal right which they possessed and the fact that such exercise caused loss to others or that the persons so exercising their legal right knew that its exercise would cause loss to others was not considered material. But the second proposition above set forth was sustained, but only on the ground that the inhibition against combinations and conspiracies therein contained was understood as referring only to acts of violence, intimidation and wrong of the kind and character described in other clauses of the injunction. In upholding the second proposition aforesaid the Court was only willing so to do when able to interpret the words contained therein as not covering the case of employees who, being dissatisfied at the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action. The Court also considers what would have been the law had the second proposition aforesaid received the construction which the Supreme Court of Wisconsin apparently gave the acts of the accused in this case. That is, if it could have been construed as covering the case of the exercise of a legal right but from bad motives. Upon that point the Court said (p. 321 of 63 Fd. R.):

"These employees having taken service, first with the com-
"pany and afterward with the receivers, under a general con-
"tract of employment which did not limit the exercise of the
"right to quit the service, their peaceable co-operation as the
"result of friendly argument, persuasion or conference among
"themselves in asserting the right of each and all to refuse
"further service under a schedule of reduced wages would not
"have been illegal or criminal *although they may have so acted*
"in the firm belief and expectation that simultaneous quitting
"without notice would temporarily inconvenience the receivers
"and the public. If in good faith and peaceably they exercised
"their right of quitting the service, intending thereby only to
"better their condition by securing such wages as they deemed
"just but not to injure or interfere with the free action of
"others they cannot be legally charged with any loss to the
"trust property resulting from their cessation of work in con-

"sequence of the refusal of the receivers to accede to the terms "upon which they were willing to remain in the service."

We submit that all this may be accurately summed up in the following propositions: It is lawful for two or more engaged in the same business to agree together to refuse to contract, or continue contract relations terminable at will, with another even though they do this with the knowledge or expectation that the exercise of this right on their part will cause loss to third persons or to a third person. But when they go beyond the acts necessary for the exercise of their right of liberty to contract, and combine or conspire to do some other act not essential (although convenient) to the exercise of their right and *which encroaches upon the legal right of some other person, and therefore wrongful,* they are liable. In short, the decision is in line with the proposition that no matter what loss or damage comes from the exercise of a legal right on the part of one person, or with what motive he exercises that legal right, he cannot be held answerable in the law.

Martell vs. White et al., decided by the Supreme Judicial Court of Massachusetts, March 1, 1904, and reported in 69 N. E. Rep., 1085, is an extreme case seemingly in conflict with *Bohn Mfg. Co. vs. Hollis, supra,* and cases cited in the latter opinion. But this conflict, if it exists, has no bearing on the question we present here for consideration because our position here brings us, we think, within the protection of all the precedents, however much they may disagree on minor or collateral questions. In the case of *Martell vs. White* the plaintiff was engaged in the business of quarrying granite and *selling it to granite workers.* The defendants were members of a voluntary association which aimed to include in its membership that class of persons who by reason of their business or occupation would be customers of the plaintiff and the association had a by-law authorizing the imposition of heavy fines upon any member, "having business transactions with any party or concern in Quincy or its vicinity not members hereof and in any way relating to the cutting, quarrying, polishing, buying or

selling of granite." The plaintiff was not a member of the association. His business was of the kind and at the place covered by the by-law and several members of the association were fined for dealing with the plaintiff who was fairly designated as to customers, location and kind of business by the by-law in question. It will be at once apparent that the defendants were not advocating the liberty to contract or refuse to contract for the members who did business with the plaintiff but were imposing heavy fines upon the members for the exercise of this very right. It was an attempt by association to put into force a rule of action (said by-law) which would under our contention here be invalid if enacted by the legislature of Massachusetts or Wisconsin because it imposed upon its members a fine upon the exercise of their right to contract with whom they pleased. The Court decided, rightly we think, that this was a legal injury to the plaintiff because it prevented by illegal means persons from trading with the plaintiff. The Court then holds that by reason of the coercive effect of the fines imposed the action of defendants in enforcing this by-law restraining the liberty of contract was not justified by the law of competition and went beyond what was justified in such cases.

The case last cited, then, is authority for the following propositions:

First.—A by-law imposing heavy fines or penalties upon the members of an association who deal with a certain person or with a class including that person is invalid as interfering with his liberty to contract and if loss of trade to any person comes through the enforcement of such invalid by-law he may recover damages from those engaged in its enforcement.

Second.—It is no justification for the enforcement of such a by-law that some of the members of such an association which attempted to enforce it were competitors in business with the injured party. The members could not have been competitors in the transaction in which they were parties or customers.

It will be seen that in the case under consideration the parties defendant went away beyond their legal right of liberty to

contract and sought by enforcing fines or penalties to prevent others from contracting with the plaintiff who possessed like liberty. The difference between such a case and that of three persons voluntarily entering into an association to combine their resources and skill and exercise their right to refuse to contract with whom they please except upon condition and to take advantage of this right so exercised to offer to the trade advantages and inducements by which trade will leave their competitor and come to them, as in the case at bar, is too manifest to need further elucidation.

The case of *Van Horn vs. Van Horn*, 52 N. J. Law, 284; 20 Atlantic Rep.. 485; illustrates a series of acts going entirely beyond what was necessary to exercise the right to engage in competition and intended to ruin the plaintiff's business. The case was rightly decided.

In *Vegelahn vs. Guntner*, 167 Mass., 92; 35 L. R. A., 722; which was a strike case, in the majority opinion it was held that maintaining a patrol in front of or around the plaintiff's premises, with other acts of intimidation, directed to the plantiffs and to persons actually employed or seeking to be employed by the plaintiffs was an unlawful interference with the rights both of employer and of employed. The Court said:

"An employer has a right to engage all persons who are "willing to work for him at such prices as may be mutually "agreed upon and persons employed or seeking employment "have a corresponding right to enter into or remain in the em-"ployment of any person or corporation willing to employ "them. These rights are secured by the constitution itself. "* * * The defendants contend that these acts were justifi-"able because they were only seeking to secure better wages for "themselves by compelling the plaintiff to accept their schedule "of wages. This motive or purpose does not justify *maintain-"ing a patrol in front of plaintiff's premises* as a means of "carrying out their conspiracy. A combination among persons *"merely to regulate their own conduct* is within allowable com-"petition and is lawful, although others may be indirectly af-"fected thereby, but a combination to do *injurious* acts express-"ly directed to another by way of intimidation or constraint, "either of himself or of persons employed or seeking to be em-"ployed by him, is outside of allowable competition and is un-"lawful."

There were two dissents in this case, one by Chief Justice Field and one by Justice Holmes, that of Chief Justice Field principally dissenting from a claim of equity jurisdiction in such case and that of Justice Holmes agreeing with the majority of the Court in the law but disagreeing on the point whether or not the combination to maintain a patrol on the plaintiff's premises for the purpose of meeting and dissuading persons employed or seeking employment by the defendant was an *unlawful* act. Quoting from the last dissenting opinion:

"I agree, whatever may be the law in the case of a single "defendant (*Rice vs. Albee*, 164 Mass., 88), that when a plaint- "iff proves that several persons have combined and conspired "to injure his business and have done acts producing that effect "he shows temporal damage and a cause of action unless the "facts disclosed, or the defendants prove some ground of excuse "or justification; and I take it to be settled and rightly settled *"that doing that damage by combined persuasion is actionable* "as well as doing it by falsehood or by force. * * * The "only debatable ground is the nature of the means by which "such damage may be inflicted. We all agree that it *cannot* "be done by force or threats of force; we all agree, I presume, "that it *may* be done by persuasion to leave a rival's shop and "come to the defendant's; it *may* be done by the refusal or with- "drawal of various pecuniary advantages which apart from "this consequence are within the defendants' lawful control; it "*may* be done by the withdrawal of or threat to withdraw such "advantages from third persons who have a right to deal or not "to deal with the plaintiff, as a means of inducing them not to "deal with him either as customers or servants." Citing cases.

Again:

"The fact that the immediate object of the act by which "the benefit to themselves is to be gained is to injure their an- "tagonist *does not necessarily make it unlawful*, any more than "when a great house lowers the price of certain goods for the "purpose and with the effect of driving a smaller antagonist "from the business."

Plant vs. Woods, 176 Mass., 492; 51 L. R. A., 339; is a late case, apparently considered with great thoroughness and importance because of the peculiar legal relations presented by the facts, covering the combination of strike and boycott. The plaintiff was a labor organization apparently having capacity

to sue and be sued and the defendant a like organization. The defendant organization claimed to be the genuine labor organization and that the plaintiff organization was really composed of non-union men, and defendant declared all painters not affiliated with the defendant to be non-union men and *voted to notify employers of that declaration.* Afterward the defendant organization *voted that all its members working in shops where members of the plaintiff organization were employed should refuse to go to work and sent an agent to the shops where the plaintiff's members were employed, informed the employer there, of the action of the defendant organization* and requested him to induce such members of the plaintiff's organization as were in his employ to sign applications for membership in the defendant organization. No threats of personal violence were made, no express request to discharge the members of the plaintiff organization, but the employer was notified of the action of the defendant organization in voting that its members refused to work in shops where the plaintiff's members were employed and the request aforesaid was made, and in this way the employer was given to understand that his continued employment of the plaintiff's members who did not sign such applications would lead to trouble in his business in the nature of a strike or boycott. The Court said:

"We have therefore a case where the defendants have con-
"spired to compel the members of the plaintiff union to join the
"defendant union and to carry out their purpose have resolved
"upon such coercion and intimidation as naturally may be
"caused by threats of loss or property by strikes and boycotts
"to induce the employer either to get the plaintiffs to ask for
"reinstatement in the defendant union or, that failing, then to
"*discharge them.*"

The foregoing are the conclusions of fact from the situation as the Court understood the situation and to which the Court applied the law. It will be at once seen that this case brought up the question of conflict of legal rights. The plaintiff's members had the right under the law *to contract with and work for whom they choose and at what price they choose without giving any reason therefor, and without being obliged to*

become members of the defendant organization as a condition of their exercise of their constitutional right to make contracts for their labor. At the same time the defendant organization and its members *had the right in the law to withdraw singly or in a body from the service of the employers in question for any reason which seemed to them sufficient.* They had no right, however, apart from their right to contract or refuse to contract, to coerce or persuade employers not to employ the plaintiff's members. If loss come to one from the exercise of a legal right by another it is *damnum absque injuria*, but if that other goes beyond the exercise of his legal right and does some act not essential to the exercise of that legal right and does this latter act with the intent to cause loss and the act does cause loss, the case is quite different. This is readily illustrated by considering the case for a moment as if the defendants had nothing whatever to do with the work at which the plaintiff's members were engaged, were not painter workmen at all, and approached the employers of the plaintiff's members with the purpose of endeavoring to persuade or coerce such employers from giving work or employment to the plaintiffs. In such a case it will be at once answered that they were invading the legal rights of the plaintiffs and committing an unlawful act. What difference did it make t. * the defendant's members were engaged in the same line of work and in the service of the same employers with the plaintiff's members? The defendant's members had a right to refuse to contract with or work for said employers without giving any reason for such action. They could do this singly or all together. But they were not content with this. They went further and committed the illegal act of coercing or persuading these employers to discharge the plaintiff's members. This illegal act was superadded to the act of refusing to work for such employers which they had legal right to do. This illegal act *was not necessary to the exercise or enjoyment of the legal right on the part of the defendant's members to refuse to contract with or work for any person, with or without a reason. In visiting the employers and presenting conditions they went beyond what was necessary for*

the exercise of their own right of freedom to contract and invaded the right of the plaintiff's members. The Court decides this, not in these words but in substance, although the Court seems to go further than is necessary for the decision of the case. We quote:

"Everyone has a right to enjoy the fruits and advantages "of his own enterprise, industry, skill and credit. He has no "right to be protected against competition, but he has a right "to be free from malicious and wanton interference, disturb- "ance or annoyance. *If disturbance or loss comes as a result "of competition or the exercise of like rights by others, it is "damnum absque injuria unless some superior right by con- "tract* or otherwise is interfered with. * * * The defend- "ants contend that they have done nothing unlawful and in "support of that contention they say that a person may work "for whom he pleases and in the absence of any contract to the "contrary may cease to work when he pleases and for any rea- "son whatever, whether the same be good or bad; that he may "give notice of his intention in advance, with or without stating "the reason; that what one may do several men acting in "concert may do and may agree beforehand what they will do "and may give notice of the agreement and that all this may "be lawfully done notwithstanding such concerted action may, "by reason of the consequent interruption of the work, result "in great loss to the employer and his other employees and that "such a result was intended. In a general sense and without "reference to exceptions arising out of conflicting public and "private interests all this may be true. It is also said that "where one has the lawful right to do a thing the motive by "which he is actuated is immaterial. * * * But in many "cases the lawfulness of an act which causes damage to another "may depend upon whether the act is for justifiable cause and "this justification may be found sometimes in the circum- "stances under which it is done, irrespective of the motive, "sometimes in the motive alone and sometimes in the motive "and circumstances combined."

The Court then cites several cases of trade competition relative to malice in the doing of an act otherwise legal; but sums up by taking the case out of the rule of competition in these words:

"The necessity that the plaintiffs should join this associa- "tion is not so great nor *is its relation to the rights of the de-*

"*fendant as compared with the right of the plaintiffs to be free* "*from molestation* such as to bring the acts of the defendants "under the shelter of the principles of trade competition. Such "acts are without justification and are therefore malicious and "unlawful and the conspiracy thus to force the plaintiffs was "unlawful."

It is not easy to ascertain from this opinion on what ground the decision is placed. Before coming to the question of malice or discussing the law of competition the Court uses these words:

"In this as in every other case of equal rights the right of "each individual is to be exercised with due regard to the sim- "ilar right of all others and the right of one may be said to "end where that of another begins."

This would seem to refer to the maxim "*sic utere tuo ut alienum non laedas*" and to apply that rule to the exercise of the right to contract, because both parties in this case were claiming the right to contract. Further on in the opinion the decision seems to be put on the ground that the motives of the defendant association were malicious; but it surely could not have been the intention of the Court to decide that the acts charged against the defendants were illegal because malicious and consequently malicious because they were illegal. It is said that unless there was a justifiable cause the acts were malicious and unlawful. But which acts? Of course, it is elementary that the law infers malice from the wilful commission of an unlawful act; and if by this is meant that the act of preventing the plaintiffs from obtaining employment was unlawful and consequently malicious the proposition that it was malicious would necessarily flow from the decision that it was unlawful. But if it is meant that the act in question would have been lawful had it been found as a matter of fact that the defendants performed in good faith, thinking it to be for their best interests, then the opinion is unintelligible. So that we are not to suppose the last proposition was intended to be decided and that proposition is inconsistent with the conclusion that the requirement that the plaintiffs should join this association was not such in its relation to the rights of the de-

fendants as compared with the rights of the plaintiffs as to bring the acts under the shelter of the principles of trade competition. It seems to us that this case decides that the act of persuading or inducing an employer not to employ or not to continue in his employment certain persons is an unlawful act in a case where the person so persuading the employer is not himself an applicant for the same position from which he seeks to have the other discharged. In other words, in the case of *Plant vs. Woods*, the defendants were not in the exercise of a legal right of their own in causing injury to the plaintiffs. They went beyond what was necessary for an exercise of their legal right and invaded the legal right of liberty to contract of plaintiffs.

This brings up the question, How shall we ascertain when competitors have gone beyond their legal rights in such matters? Surely not from the criterion that their acts have caused or may cause loss to another party. Perhaps the answer to this question will have to be worked out slowly by the Courts from a great number of decisions as many other questions have been in particular cases, but it seems to us that the law has progressed far enough on this point so that we may say that in every case where the deefndants have done nothing more than that which some affirmative rule of constitutional law authorized them to do they cannot be held answerable in damages or in fine for so doing without denying and destroying this constitutional right, no matter with what motive they have exercised that right. The dissenting opinion in *Plant vs. Wood*, as well as the opinion of the majority of the Court, seems to also go upon the ground that the act of the defendants or any act *which interferes with the exercise of a right on the part of the plaintiff* is illegal unless justified and that justification must be found in the law. The dissenting opinion of Mr. Justice Holmes says that:

"Justification may depend upon the object of their con-"duct, that is, upon the motive with which they acted."

We understand that that language is to be limited to the case before the Court and does not refer *to any justification of*

the acts of the defendant in quitting work or refusing to work either singly or in a body, because that act was their constitutional right and required no justification; but it refers to the act of the defendant in persuading the employer to discharge the plaintiff's working men and in *threatening* to exercise or refrain from exercising a certain legal right, viz: the right to suspend contract relations unless the employer would so discharge the plaintiff's members. This interesting case is further cited under the subdivision of this brief relating to the sufficiency of the plea of the defendant Aikens.

In *Perkins vs. Pendleton*, 90 Me., 166; 38 Atlantic Rep., 96, the question of whether or not it is an unlawful act or tort to procure the discharge of a workman by threatening, persuading and inducing his employer to discharge him because he would not join a certain labor union came up on demurrer and unincumbered with other questions and the Court held that this was a wrong or tort and reviewed several cases, but does not agree with our position in this brief that it is a wrong or tort for any person not in the exercise of *a legal right the exercise of which requires him to do such a thing* to persuade an employer to discharge his servant. It declines to go so far. The Supreme Court of Maine, however, draws this distinction in the following words in this class of cases:

"The case of *Heywood vs. Tillson*, 75 Me., 225, in no way "conflicts with this result. There the Court simply decided "that the defendant was not liable for doing what *he had a per-"fect and absolute right to do, even if in doing this he was act-"uated by a malicious motive against the plaintiff.* Many cases "were cited to the effect that malicious motives make a bad act "worse, but they cannot make that wrong which in its own es-"sence is lawful."

In the case of *Hopkins vs. Oxley Stave Company*, decided in the Circuit Court of Appeals for the Eighth circuit, reported in 83 Fed. Rep., 912, it was recognized as a wrong and tort to combine to wrongfully interfere with the plaintiff's freedom of action in the management of his own affairs and business; and in this view, compelling a man to join a labor organization against his will must be in itself a tort. The Court says that if

it concedes that the reasoning employed in *Bohn Mfg. Co. vs. Hollis,* 54 Minn., 223; 55 N. W. Rep., 1119, was sound as applied to the facts in the case, "yet it by no means follows" (and that fact was recognized in the decision) that the members of the association would have had the power to combine for the purpose of compelling other persons *not members of the association to withhold their patronage* from a wholesale dealer who failed to conduct his business in the mode prescribed by the association.

In *Knudsen vs. Benn,* 123 Fed. Rep., 636, the Court said in reference to one of this class of cases:

"Fellow workmen may agree together to leave at once the "service of their employer, but having done so and being no "longer interested in that matter, then, notwithstanding cer- "tain dicta in cases that have been read from, it does not seem "clear to me that they are acting lawfully when they are per- "suading the servants of their former employer to break their "contracts and leave the service. It is a matter that does not "concern them any longer. It is a matter that is apparently "injurious to their former employer. It seems to me that such "an interference in a matter with which they have no rightful "concern and which is injurious to another is not lawful."

In *Underhill vs. Murphy,* (Ky.); 78 S. W. Rep., 482, procuring or coercing persons not to deal with the plaintiff by force or intimidation was further considered an injury *to the good will of plaintiff's business.* This gave a basis of chancery jurisdiction.

The case of *Barr vs. The Essex Trades Council, et al.,* 53 N. J. Equity, 101; 30 Atlantic Rep., 881, is an extraordinary and a leading case. It is extraordinary in the extent of the combination against the plaintiff and in the methods employed. It was a boycott case within the definition of boycott hereinbefore quoted. The defendant was the publisher of a newspaper. His employees were members of the local typographical union and he entered upon the policy of purchasing in New York stereotype plate matter for use in his paper. This stereotype plate contained news and matter edited and set up in New York and suited to the general needs of newspapers. The defendants were eighteen organizations or labor unions embracing different

trades and employments, many or most of them having nothing to do with the business of typesetting, and these eighteen bodies were represented by selected members or delegates in a society or representative body known as the Essex Trades Council. This latter body collected statistics from each member of the eighteen labor unions by requiring such member to fill out a blank slip furnished for that purpose, stating the amount expended by him in purchases during a given period, the character of the articles bought *and the names of the tradesmen with whom he has dealt.* These cards were filled up and returned by the members to their own union and by that union reported to the Essex Trades Council. The Essex Trades Council having this knowledge so acquired and controlling the various unions undertook to publish names and addresses of tradesmen and persons in business, including professional men, whom it deemed worthy of patronage. Thus armed the Essex Trades Council declared a boycott against the plaintiff. Plaintiff's patrons were advertisers and purchasers of and subscribers to his newspaper. The Trades Council brought to the notice of the customers of the plaintiff their boycott of the plaintiff and issued circulars advertising it and intimated that the patronage of *all these various trades unions and the members thereof would be withdrawn* from those who patronized the plaintiff. Under our view of the law, this was beyond question an actionable conspiracy. The defendants are not exercising a right to contract or refuse to contract at all. The Court on the question of motive said: (Rep., p. 884.)

"The defendants claim, and they are entitled to be credited "with being sincere in the contention, that they believed in all "matters complained of they acted strictly within the lines of "their legal rights. This position justifies us in assuming that "if they had not believed so and had not been satisfied they "were correct in law and acts challenged would not have been "committed and if now convinced they are wrong will not again "be attempted."

The Court then inquires whether the defendants were privileged to inflict this injury on the complainant, traces the right

of the complainant to carry on his business in his own way, which assertion carries with it a negation of any right on the part of others to interfere with carrying on his business, reviews many of the authorities and takes up the question of malice. It says: (p. 886.)

"Malicious injury to the business of another has long been "held to give a right of action to the injured party."

Citing many well known cases and quoting from *Van Horn vs. Van Horn*, 56 N. J. Law, 318; 28 Atlantic Rep., 669, as follows: (p. 886.)

" 'The Courts look through the instrumentality or means " 'used to the wrong perpetrated with the malicious intent and " 'base the right of action upon *that*.' The right of action de- "pends, then, not so much upon the nature of the act done as "upon *the intent with which it is done*, always assuming that "*injury* has attended the doing of it."

He quotes (at p. 886) from the opinion of Judge Taft in *Toledo, etc., Ry. Co. vs. Pa. Ry. Co.*, 54 Fed. Rep., 730, as follows:

" 'It is generally lawful for the combiners to withdraw their " 'intercourse and its benefits from any person and to announce " 'their intention of doing so, and it is equally lawful for the " 'others of their own motion to do that which the combiners " 'seek to compel them to do. Such combinations are said to be " 'unlawful conspiracies, though the acts themselves when con- " 'sidered singly are innocent, when the acts are done with " 'malice, i. e., with the intention to injure another without law- " 'ful excuse.' "

He also (at p. 887) quotes from *Steamship Company vs. McGregor* (one of the opinions) as follows:

" 'Now intentionally to do that which is calculated in the " 'ordinary course of events to damage, and which does in fact " 'damage, another in that other person's property or trade, is " 'actionable *if done without just cause or excuse*. Such inten- " 'tional action when done without just cause or excuse is what " 'the law calls a malicious wrong.' See also *Temperton vs. "Russell* (1 Q. B., 715). This renders necessary an inquiry as "to the intent of the defendants to ascertain *if the case falls*

"within the class in which it is held that a malicious motive is "the defendant may make an act which would not be wrongful "without the malice, a wrongful act when done with malice. "Steamship Co. vs. McGregor, 23 Q. B. Div., 598, 608. From "the authorities the test is, Has the injury been inflicted inten- "tionally and without legal excuse? When we speak in this "connection of an act done with malicious motive it does not "necessarily imply that the defendants were actuated in their "proceedings by spite or malice against the complainant, Mr. "Barr, in the sense that their motive was to injure him per- "sonally, but that they desired to injure him in his business in "order to force him not to do what he had a perfect right to do. "In this case the defendants have, I doubt not, no personal "spite against Mr. Barr and no desire to do him a personal in- "jury. Nor do I suppose they wish to permanently injure his "enterprise, for they undoubtedly want re-employment for "those who left him. They only wish by crippling his business "to compel him to accede to their views as to the material he "shall use in the make up of his paper."

The opinion then, after having found the act committed, the intention with which that act was committed, that malice was a necessary ingredient of the act, if wrongful, and that there was no malice in the act in question, proceeds: (p. 859.)

"A legal excuse for the action of the defendants is next "sought in the claim that the Essex Trades Council is a busi- "ness institution and that what it has done has been done in "the prosecution of such business, seeking, I suppose, to bring "the acts within the rule of *Steamship Co. vs. McGregor,* 15 Q. "B. Div., 476; 23 Q. B. Div., 598. That case proceeded upon the "doctrine of a lawful competition in business, both parties be- "ing engaged in carrying on the same character of business "and the acts complained of having been adopted for the ad- "vancement of the defendant's own trade."

The court then says that the members of the various trades unions are not carrying on competition in advertising for hire or in publishing newspapers with Mr. Barr. It is quite difficult to see any safe legal ground upon which this decision has been put by the court, but it is not difficult to find legal ground for the decision on the facts set forth. The defendants were in the exercise of no legal right in interfering with the plaintiff's patronage. They committed the wrong or tort which is com-

mitted in all cases of boycott or ostracism or even in cases of libel by words not actionable in themselves, but tending to hold the plaintiff up to contempt or ridicule and so lessen his esteem in the community in which he lives and consequently his liberty to engage in trade and carry on his business. Why it should be doubted that this is a tort and a wrong in cases where a shoemaker takes up the quarrel of a typesetter or in cases where a typesetter not striving to obtain a contract with the advertiser himself, tries to induce the advertiser not to contract with the newspaper publisher in order that the newspaper publisher may be coerced to forego some legal right of his, we cannot state. But the case is cited for this proposition, which is contained in it by the decision there given, notwithstanding it is considerably covered up by words, viz:

"No matter how kind or benevolent the intention of the sev-
"eral members of a combination formed for the purpose of driv-
"ing off plaintiff's customers by threats or persuasion may be,
"their act in so doing is unlawful and hence malicious within
"the legal meaning of the latter term."

Another leading case is *Park & Sons Company vs. National Druggists' Association*, 175 N. Y., 1; 67 N. E. Rep., 136; 62 L. R. A., 632; which should be put alongside of the case last hereinbefore stated. The case we are now considering seems to have been thoroughly briefed and presented and well considered by the Court. The questions decided arose on demurrer and the decision is not so rambling as in the preceding case, but there were questions of trade marks, copyrights and patents which might to some extent have affected the decision. The members of the Court filed different and dissenting opinions, but there seems to be general concurrence, either expressly or by implication, in all the opinions in the proposition that for the purpose of obtaining either customers or terms for themselves two or more competitors may combine against another competitor without reference to their intention in so doing. Speaking of the word "malice" as used in such cases the dissenting opinion of Martin, J., who was inclined to think the conspiracy was unlawful, quotes from *Doremus vs. Hennessey*, 176 Ill., 608:

"Losses wilfully caused by another from motives of malice "to one who seeks to exercise and enjoy the fruits and ad- "vantages of his own enterprise, industry, skill and credit, will "sustain an action. * * * Malice as here used does not "merely mean an intent to harm, but means an intent to do a "*wrongful* harm and *injury*. An *intent* to do a *wrongful* harm "and *injury* is unlawful and if a *wrongful* act is done to the "detriment of a right of another it is *malicious* and the act "*maliciously* done with the intent and purpose of injuring an- "other is not lawful competition."

The above is not quoted as a precedent for clearness of expression, but we think there can be gathered from it what the Judge intended to say.

In *Delz vs. Winfree*, 80 Tex. Sup. Ct., 400; 16 S. W. Rep., 111, both sides of this question are presented in the decision; that is, what will constitute an actionable conspiracy and what exercise of right on the part of the confederate will render the combination not criminal. This case also shows an important qualification of the right of competition present in all cases of boycott. The Court said:

"A person has an absolute right to refuse to have business "relations with any person whomsoever, whether the refusal is "based upon reason or is the result of whim, caprice, prejudice "or malice, and there is no law which forces a man to part with "his title to his property. *The privilege here asserted must be "limited, however, to the individual action of the party who as- "serts the right.* It is not equally true that one person may "from such motives *influence another person to do the same "thing.*"

This sets forth our position and what we claim the law to be on this question, always keeping in mind that contract and competition cover rights to the exercise of which the co-operation of two or more is necessary. This case was tried on its merits afterward and is again reported, 6 Tex. Civil App., 11; 25 S. W. Rep., 50. See also *Walker vs. Cronin*, 107 Mass., 555.

In *Beck vs. Railway Teamsters' Protective Union*, 118 Mich., 497; 77 N. W. Rep., 13; the word "boycott" is defined and a combination of acts there described found to be an unlawful conspiracy and several cases are reviewed. The defendants in that case undertook by threats, distribution of circulars

and pickets to prevent other workmen having contract relations with the plaintiff. The Court said very aptly:

"This is not a question of competition, but rather an at-"tempt to stifle competition."

National P. Assn. vs. Cummings, 170 N. Y., 315; 58 L. R. A., 135, is a noteworthy case in which it is said in the majority opinion that one or more men may refuse to work for another for any reason deemed by them sufficient. The dissenting opinion concedes this but takes the ground that this right of refusal must not be exercised for the purpose of interfering with the liberty to contract of another person.

Many other cases of strikes and boycotts could be cited, but we have selected in the foregoing chapter representative cases of this kind, particularly trying to present cases where there were no threats or rioting or other form of unlawful intimidation used. We think it will be apparent from a review of these cases that the act of a striker in prohibiting or preventing by any means another workman from taking employment, even by persuading the employer not to take him, the striker himself not offering his services instead, and *a fortiori* every case of boycott involves an unlawful act. It is unlawful because it is an invasion of a legal right which the other party possesses, viz: the right of freedom of contract, to contract with whom he pleases and upon what terms he pleases. In invading this right the striker or the boycotter *is not engaged in the exercise of any similar right in his own behalf.* His motive may in some such cases be inquired into. But when the act is not merely indifferent, but illegal, the question of motive becomes immaterial because the act itself is illegal. This has been, as the quotations heretofore show, repeated in many cases, yet in some cases the Courts have in addition attempted to cover questions not necessarily in those cases. In many of those strike and boycott cases the Court was asked to issue an injunction restraining strikers or boycotters from carrying on their strike or boycott. Because of existing precedents to the effect that a libelous publication would not be enjoined, these Courts in such injunction cases have sought to distinguish between the

wrong committed by a libelous publication which merely holds a party up to contempt and ridicule or lessens him in the esteem of the public and the wrong that is done by a boycott or by persuading other persons not to have trade or contract relations with the aggrieved party. This we submit was a mistake on the part of those Courts and we contend that the right violated by a combination of persons formed for the purpose of persuading the public or any considerable portion thereof not to deal with or patronize a person, violates the same legal right of such person as is violated by a libelous publication of the kind aforesaid. If one publish of another that he is an "itchy old toad" (*Villers vs. Monsley*, 2 Wils., 403), or a "frozen snake" (*Hoare vs. Silverlock*, 12 Q. B., 624), or "a man of straw" (*Eaton vs. Johns*, 1 Dowl. N. S., 602), or a "hypocrite" (*Thorley vs. Lord Kerry*, 4 Taunt., 355), or "an enormous swine" (*Solverson vs. Peterson*, 64 Wis., 198), or a "liar" (*Hake vs. Brames*, 95 Ind., 161), or an "ingrate" (*Cox vs. Lee*, L. R. 4 Ex., 284), or of a physician that he is ignorant in his calling (*Gauvreau vs. Superior Publishing Company*, 62 Wis., 403), the publisher is held liable for a tort because he is engaged in inflicting by indirection the same wrong that is directly inflicted by a large combination of persons who directly solicit the public or all that part of it which they can reach to refuse or discontinue trade relations with the plaintiff. The wrong here also is depriving the libeled person of business intercourse, which consists of making contracts, and also social intercourse with his fellow men. In the boycott and strike cases above referred to the boycotter and striker merely act more directly to the same result and commit the same wrong upon the person to be coerced and the same damage, by direct appeal to the community or to a large portion of it, not to deal with the person to be coerced instead of employing the fiction of the "enormous swine" or the "frozen snake." We submit that the boycott and the strike cases properly understood have no bearing upon the questions under discussion in the case at bar, because in the strike cases the strike is legal and upheld by the authorities so long as it is only carried to the extent of re-

fusing to work or quitting work singly or all together, *no matter what may be the motive for so doing,* and the boycott is always illegal.

In the chapter of this brief entitled "Malice" we consider and cite the authorities which affirm the proposition that the motive attending the exercise of an otherwise lawful—that is, not unlawful—act or the purpose with which such act is exercised, cannot change the legal quality of the act and make that a wrong which but for such motive or purpose would not have been a wrong. This view evidently regards all human acts as either legal or illegal and does not admit of a class of indifferent acts which might be legal or illegal according to the motive of their exercise and the resulting loss. While in the foregoing class of cases are found the decisions which, with the cases cited in these decisions, go to limit the older and greater number of decisions by asserting, for the most part in very ambiguous terms, that an act otherwise lawful may become actionable if it be done with a malicious motive and cause, as some say, "damage," to another, as other cases say, "injury." But that conflict does not enter into the questions before the Court in this case at bar, because both lines of decision recognize in every case, we think, either expressly or by necessary implication, that *where the legal right in question consists in the exercise of the acts charged as wrongs, or what is the same thing when the alleged wrongs are such acts as are necessary to the exercise of the particular legal right conceded abstractly, but sought to be denied because of malice,* the motive or purpose with which the right exercised is immaterial. But when the acts charged as wrongs are, when regarded apart from malicious intention or purpose, merely indifferent, that is to say, not illegal, and although done under a claim of a legal right, are not so necessary or essential to the exercise of that right that to forbid the act would be to deny the right, to restrain or hamper the act would be to restrain or hamper the right, and where the legal right cannot be said to consist in the exercise of the acts challenged, there are, no doubt, in the large class of cases above referred

to, both decisions and dicta that if from such indifferent acts done with malevolent purpose damage flow such acts become actionable wrongs. But without taking sides in this controversy, we maintain that in the case at bar there could be no actionable wrong under either class of cases. Because the acts charged of co-operation and refusal to contract, except on condition, are essential to the exercise of the right to make contracts as well as essential to the right to enter into trade and engage in competition, and to clog those acts with conditions is to clog the right contended for with conditions. This very constitutional right involves in its exercise the doing of the same acts which are here charged to have been malevolently done. In any such case to punish one for doing such act on the ground that he did it from malicious motives would be to strike down at once the whole theory of liberty to contract. Because a man cannot be said to be at liberty to do that which he is subject to arrest and judicial inquiry for doing. So much on the bare proposition of liberty to contract. When we come to the consideration of trade competition nothing could be truer and more appropriate than the remarks of the Judge in *Chambers vs. Baldwin*, 91 Ky., 122:

"Competition frequently engenders not only a spirit of riv-
"alry, but enmity; and if the motive influencing every business
"transaction that may result in injury or inconvenience to a
"business rival was made the test of its legality, litigation and
"strife would be vexatiously and unnecessarily increased and
"the sale and purchase of commodities very much hindered."

VI.

MALICE.

In an article found in the Reports of the American Bar Association, Vol. 21, for 1898, discussing the question of "Malice In Civil Actions," the author quotes Lord Macnaghten as saying, "Sometimes, indeed, I rather doubt whether I quite understand that unhappy expression myself," and cites other legal authority to the effect that this "unfortunate word," this "per-

plexing word," has occasioned much confusion in the law. For the purpose of avoiding some of this confusion we will use the word "malice" in this chapter to indicate malice in law, or that malice which the law infers from "a wrongful (unlawful) act done intentionally without just cause or excuse." *State ex rel. Durner vs. Huegin*, 110 Wisconsin, pp. 249, 250. We will indicate the other condition, sometimes called malice in fact, by the words, "malevolent intent." There is certainly an overwhelming array of legal authority, not resting on *obiter dicta*, but on actual adjudications, to sustain the proposition that no one can be held answerable in law for the exercise of a legal right on the ground that he exercised such right with malevolent intent. *Docter et al. vs. Riedel et al.*, 96 Wis., 158, where the demurrer admitted the conspiracy for the purpose and the malevolent intent in entering up judgment on *cognovit* without notice or previous demand of payment and issuing execution thereon and levying on plaintiffs' goods, is a good illustrative case. *Raycroft vs. Tayntor*, 68 Vt., 219; 33 L. R. A., 225; was a case tried on its merits, but in which at the close of the testimony the defendant moved the court to direct a verdict in his favor, thus bringing up the question fairly for decision. The facts showed that with great anger and apparent malevolent intent the defendant, the proprietor of a granite quarry, ordered his superintendent in charge of the quarry to discharge the plaintiff and to refuse to permit the plaintiff to continue work. The Court (adopting a quotation employed) said:

"If the defendant's act be (1) legal in itself and (2) vio-
"lates no superior right in another, it is not actionable, al-
"though it be done maliciously and cause damage to that
"other."

The language above quoted is very concise and accurate compared with that found in opinions doubting, but not deciding (for we have found none deciding), the negative of the foregoing proposition. The only doubt can arise upon the description of the act as, "one legal in itself," but it is easier to criti-

cise this expression than to improve on it and we submit that the fair meaning of this expression is an act which without reference to the question of damage to another is authorized by law. This Court thought its decision supported by the following:

Walker vs. Cronin, 107 Mass., 555.
Frazier vs. Brown, 12 Ohio St., 294.
Chatfield vs. Wilson, 28 Vt., 49.
Mahan vs. Brown, 13 Wendell, 261.
Chipley vs. Atkinson, 23 Fla., 206.
South Royalton Bank vs. Suffold Bank, 27 Vt., 505.
Harwood vs. Benton, 32 Vt., 724.

We will not attempt to review all these cases, but merely refer to some of them particularly illustrative and forming the basis of other decisions. The case of *Phelps vs. Nowlen*, 72 N. Y., 39, reported with extensive notes in 28 American Reports, 93, is also a decision in direct affirmance of the proposition that in the exercise of a legal right the motives with which it is exercised are not relevant to the inquiry whether or not one is chargeable with damages caused by its exercise. The act done in *Phelps vs. Nowlen, supra*, consisted in digging on his own land a ditch through an artificial embankment around a spring and the damage caused was the lowering of the water in plaintiff's well which had apparently some subterranean connection with the spring.

See also the numerous cases cited in the notes of this case in 28 Am. Rep., 101, and numerous cases cited and collected in the article entitled, "Malice as an Ingredient of Civil Cause of Action," by L. C. Krauthoff, in Vol. 21, Reports of American Bar Association, pages 335 to 390.

In *South Royalton Bank vs. Suffolk Bank, supra*, the question was decided on demurrer which admitted malevolent intent, combination and co-operation for the purpose of injuring, breaking down and destroying the plaintiff, a banking corporation, in its business by buying up and holding large amounts of plaintiff's notes, then refusing to receive for them in exchange other circulating notes and currency and accumulating the same and presenting them to the plaintiff and requiring the

plaintiff to pay coin in redemption therefor as fast as defendant could buy up such quantities. It was held that no action could be maintained, notwithstanding these acts were done from malevolent motives, because the defendants were only doing those acts which they had a legal right to do.

In *Auburn, etc., Plank Road Company vs. Douglass*, 9 N. Y., 444, 450, this question was decided upon demurrer to an answer carried back to the complaint so that the point was expressly adjudicated upon the following facts: A farmer owning land adjacent to a toll gate on a turn pike road took down his road fences and graded a track on his own land connecting at both ends with the plaintiff's road and extending on both sides of plaintiff's gate and allowed persons traveling the turn pike to use his land with the road so made to avoid the toll gate. It was held there was no liability. An interesting indication of our progress towards socialism (8 Harvard Law Review, 511-532) in fifty years may be found by comparing this opinion of Selden, J., in which he alleges the following reason as conclusive against recovery, with the opinion of the Wisconsin Supreme Court:

"If malignant motive is sufficient to make a man's dealings "with his own property actionable when accompanied by dam- "age to another, where is this principle to stop? It will apply "to a thousand other cases with the same force as to this. If a "man sets up a trade not with a view to his own profit, but "solely to injure one already established in the same trade, how "can the case be distinguished in principle from this?"

The case of *Glencoe, etc., Co. vs. Hudson, etc., Co.*, 138 Mo., 439; 40 S. W. Rep., 93, is also a good illustrative case decided upon demurrer. Although the pleading demurred to contained no averment of malevolent intent, it did aver an existing contract with a railroad company by plaintiff for removing and hauling gravel and sand and that the defendant induced the railroad company to break its contract with plaintiff by notifying the railroad company that defendant was the owner of the land from which the sand and gravel were being taken and would hold said railroad company liable in trespass if it moved

any more. Without at all opening the controversy between *Lumley vs. Gye*, 2 El. & Bl., 216, and cases following that case and *Chambers & Marshall vs. Baldwin*, 91 Ky., 122; 15 S. W. Rep., 57; and cases there cited, a conflict which is immaterial to the questions here under discussion, it will be observed that in *Glencoe, etc., Co. vs. Hudson, etc., Co., supra*, the defendant did nothing more than was necessary to the exercise of its right to hold and enjoy property and protect its own property in giving the notice and it was held there was no liability.

On the other hand, *Boyson vs. Thorne*, 98 Cal., 578; 33 Pac. Rep., 492; also decided on demurrer, perhaps goes too far, because the pleading demurred to did not show that the defendant was in the exercise of any legal right in persuading Newlands to discontinue contract relations with the plaintiff, unless, there is in California a legal right for every citizen to meddle with the business or contracts of other citizens and to advise gratuitously.

But see *Baker vs. Sun Ins. Co.*, 64 S. W. Rep., (Ky.) 967.

Chambers vs. Baldwin, 91 Ky., 122; 15 S. W. Rep., 57; was also decided on demurrer and the facts assumed to establish that the defendant with malevolent intent and with the desire to benefit himself induced a third person to break his contract with plaintiff, thus causing damage. Here the facts are so meagerly set forth in the petition that it is not possible to say whether the defendant went farther than was necessary to the exercise of his legal rights. If he merely "induced Wise to break a contract with the plaintiff by himself purchasing Wise's crop, we should say the rule was correctly applied and the plaintiff not having specifically set forth the acts by which Wise was induced to break his contract the decision on demurrer was right, and the concluding part of the opinion justifies the act apparently on the ground of trade competition. In *Boulier vs. Macauley*, 91 Ky., 135; 15 S. W. Rep., 60; decided at the same time with the last foregoing case, the same rule was applied to a contract with the dramatic performer, Mary Anderson, where there was evidently suggested to the Court a

distinction on the ground that the agreement broken was one for personal services. The Court said:

"It is not the policy of the law to restrict or discourage com-"petition in any business or occupation, whether concerning "property or personal services, there being no good reason for "making more stringent regulations in respect to the latter, "except where some one of the domestic relations exist, than "the former; for if in order to leave sale and exchange of prop-"erty free and unrestrained a person may lawfully *and without "legal inquisition of his motive* buy what another offers for sale "and has right to sell, it is no less just and expedient that in or-"der to have a fair remuneration for labor a person shall be al-"lowed to hire the service of anyone *sui juris* who offers to be "hired."

Many other cases might be referred to, such as:

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.
Adler vs. Fenton, 24 How., 407.
Kiff vs. Youmans, 86 N. Y., 324.
Allen vs. Flood, (1898 App. Cas., 1).
O'Callaghan vs. Cronan, 121 Mass., 114.
Mogul Steamship Co. vs. Macgregor, 21 Q. B. D., 544; 1892 App. Cas., 25.
Continental Ins. Co. vs. Underwriters, 67 Fed. Rep., 310.
Huttley vs. Simmons, 1898 1 Q. B., 181.
Ajello vs. Worsley, 1898, 1 Ch., 274.

And see article in 18 Central Law Journal, 424-428, which collects a great number of cases.

In *Kelly vs. The Railway* Co., 93 Iowa, 436; 61 N. W. Rep., 957, the questions decided arose on demurrer to plaintiff's pleadings, one branch or part of which raised the question whether it was an actionable conspiracy on the part of a railroad company as against the proprietor of one of its restaurants or eating houses to induce another to start a restaurant a short distance from him and to refuse to stop its trains so as to permit travelers to patronize the plaintiff's restaurant and by other acts to discriminate against the plaintiff. The Court said: (p. 452.)

"We see nothing in the petition which charges an action-"able conspiracy. Defendant had a right to run its trains as it "saw fit and also had the right to supply meals to its passen-

"gers at any place it desired. The lease made between plaintiff "and defendant did not obligate defendant to stop its trains "for meals at his house. In doing what is charged against it "defendant was neither doing an unlawful act nor a lawful act "in an unlawful manner. The motive with which one does an "act furnishes no cause of action unless there be some legal "wrong, and not then if it relate to a breach of contract."

In *Spalding vs. Vilas*, 161 U. S., 483; 6 Supreme Court Reports, 631; the Postmaster General of the United States was sued on account of official communications made by him pursuant to an Act of Congress and in regard to matters within his authority, on the claim that the communications were prompted by personal and malicious motives against the plaintiff. This Court denied the relief, saying (p. 499): "If we were to hold that the demurrer admitted for the purposes of the trial that the defendant acted maliciously, that could not change the law."

Turning to the other side of this proposition we have the cases cited in the second subdivision of this brief on Strikes and Boycotts, and also the case of *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, 44 C. C. A., 426; 62 L. R. A., 673; and cases cited in notes. This last case makes the distinction which we desire here to urge upon this Court. Because in that case the Court recognized the doctrine that certain acts become wrongs when performed with malevolent purpose which acts would not otherwise constitute legal wrongs, while other acts do not become legal wrongs no matter what malevolent purpose accompanies their exercise. The Court said:

"We are thus confronted with the inquiry whether the mo-"tive which influenced the defendant company to offer for sale "such calicoes of the plaintiff's manufacture as they had in "stock at the price named in its circular, conceding such mo-"tive to have been as alleged in the complaint, changed the com-"plexion of the act and rendered the same unlawful when but "for the motive of the actor it would have been clearly lawful. "It is common learning that a bad motive—such as an intent "to hinder, delay and defraud creditors, by virtue of statute 13, "Eliz. Chap. 5 and possibly by the rules of the common law—"will render a conveyance or transfer of property void which "but for the bad motive would have been valid. So also one who

"sets the machinery of the law in motion without probable cause "and for the sole purpose of injuring the reputation of another "or subjecting him to loss and expense is guilty of an unlawful "act which would have been lawful but for the improper mo- "tive. And one who by virtue of his situation has a qualified "privilege to make defamatory statements concerning another "may be deprived of the benefit of that privilege by proof that it "was not exercised in good faith, but in pursuance of a malic- "ious intent to injure the person concerning whom the defama- "tory statement or statements were made. Pollock Torts, "Webb's Edition, pp. 331-335, and cases there cited. There is "also some authority for saying that one who maliciously (that "is, with intent to obtain some personal benefit at another's loss "or expense) induces another to break his contract with a third "party, thereby commits an actionable wrong if special damage "is disclosed although the act done would have been lawful if "the wrongful motive had been absent. * * * The case at "bar falls within neither of the exceptions to the general rule "above stated—that if an act is done in the exercise of an un- "doubted right and is lawful the motive of the actor is imma- "terial. No one can dispute the right of the defendant com- "pany to offer for sale goods that it owned and were in its pos- "session, whether the quantity was great or small, for such "price as it deemed proper. This was the outward, visible act "of which complaint is made, and being lawful the law will not "hold it to be otherwise because of the secret purpose enter- "tained by the defendant company to inflict loss on the plain- "tiff by compelling it to reduce the cost of a certain kind of its "prints or calicoes."

By the words above quoted, "done in the exercise of an undoubted right," we think is meant that the right must be one which is not merely enjoyed or possessed negatively, but which consists in acting in the particular way in which the defendant is charged with acting in the suit in question. On this point we can refer to *Continental Ins. Co. vs. Board of Underwriters, supra*, where there were two classes of acts complained of. One was regulation of premium rates and non-intercourse with the insurance companies not members, which were held lawful because they did not transcend the bounds of trade competition. The other class of acts consisted of publishing false statements, soliciting owners to cancel policies of the companies represented outside the board and threatening to boycott agents and

customers of such outside companies and were held to be illegal.

This is also what is meant in *Quin vs. Leathem*, 1901 App. Cas., 495, where it is said (p. 536):

"The defendants were doing a great deal more than exercising their own rights. * * * Were violating their duty to "the plaintiff and his customers and servants which was to "leave them in the undisturbed enjoyment of their liberty of "action."

They were beyond what was necessary to the exercise of any right of theirs and invaded the right of a third person.

This is also the ground work of the decision in *Walker vs. Cronin*, 107 Mass., 555, and cases there cited.

Robinson vs. Texas Pine Land Assn., 40 S. W., 843.

We think it follows from this consideration of cases that malevolent intent is never considered potent to transform into a wrong a lawful act done in the exercise of a legal right which requires for its exercise that very act; but that malice may affect the quality of those indifferent acts, many of which are not illegal by themselves. In each of the cases cited in the notes to *Passaic Print Works vs. E. & W. Dry Goods Co.*, 62 L. R. A., 673, and in the cases hereinbefore cited in which malevolent intent was considered material, the acts done by defendants were not essential to the exercise of their legal rights. That is to say, their legal rights could be exercised and they could have the direct advantages flowing therefrom without committing the act charged. If the accused have a legal right and from any act necessary to the exercise of this legal right loss comes to another, the fact that the act was necessary to the exercise of the legal right justifies the act, because its exercise is part of the defendants' legal right. But if the act charged against the defendants is not absolutely necessary to the exercise of this legal right, although a remote benefit might result therefrom, then we come within the second class of cases aforesaid. For illustration, a man or body of men have the right, collectively or singly, to make contracts not forbidden by law, with

whom they please and on what terms they please. This right involves for its exercise the refusal to contract with any person except on terms. This right to refuse to contract, except upon conditions made by the party refusing, lies at the foundation of all contracts. The making of every contract involves this act and without the exercise of this act of refusing except upon terms no contract could ever be entered into. It is necessary to the exercise of the right to make contracts and hold and enjoy property that the party refusing may annex to his refusal whatever conditions he pleases. Consequently his motives for refusal or for agreeing cannot be inquired into, because such inquiry would limit or destroy that right. Just as soon as you inquire into his motives and finding his purpose malevolent deny the right, you have established a right in the opposite party, and if the opposite party is induced by malevolent motives to make the inquiry into the motives of the first party he would be committing a wrong himself. This would merely mean that every right was a wrong. The Wisconsin Supreme Court in the habeas corpus case said, speaking of Section 4466a (opinion p. 249), "The malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a wrongful (unlawful ?) act intentionally done." But when that court leaves the consideration of the requirements of the statute and comes to the consideration of the acts done, it affirms that the acts were unlawful only because they were malicious and impliedly, if not expressly, admits that the same acts would have been lawful, that is to say, not wrongful, if they were done from proper motives, meaning, done to benefit the defendants in the way of trade competition. Malice figured out in this way must necessarily be malevolent intent. Because it cannot be said that identically the same act can be lawful when committed with one intention and unlawful if committed with another intention if we are discussing malice in law. There is in that case no difference in the premises except the difference in intention. *There is nothing then for the legal inference of malice to rest on except the actual malevolent*

intent. That is to say, the malevolent motive makes the otherwise legal act a wrongful act and being thus made wrongful the law implies malice from its commission as it does from any other wrongful act. The opinion thus states that the statute under consideration calls for malice in law, and proceeds to satisfy the call of the statute by an inference of malice in fact or malevolent intent.

This condition was something of a puzzle on the first hearing in this Court and there was some doubt expressed in regard to whether the Wisconsin Supreme Court was considering malice in law or malevolent intent or purpose. We therefore analyze the matter with some detail as follows:

(1) If a certain act or group of acts is declared to be lawful when not done from malicious motives or with malicious intent and unlawful when done from malicious motives or with malicious intent, in such declaration malice necessarily means malevolent intent because the law could not infer two opposite conclusions from the same act or the same group of acts and because the addition of the term malicious intent is made to the premises of fact from which the conclusion of illegality is drawn.

(2) But having added to the certain act or group of acts the fact of malice the Wisconsin Court then derives the conclusion that the act or group of acts plus the fact malice was unlawful.

(3) Having thus found the quality of the act plus the fact of malice wrongful that Court starts with this conclusion as a new premise and draws the next legal conclusion therefrom as follows, namely: the law infers malice from the wilful commission of unlawful acts. The acts in question were unlawful acts because they were performed with malice in fact or malevolent intent, hence the law infers malice from their wilful commission. What is this but saying that the law infers malice from malevolent intent?

But when the Wisconsin Supreme Court came to make its decision to which this writ of error runs there was no such uncertainty. Because it there held that a plea that the acts charged were "done, harbored, made and entered

into in trade competition," (Record, p. 22), was no justification nor defense. So whatever may have been the effect of the original decision on habeas corpus, on this question of malice or malevolent intent the decision to which the writ of error runs and which is here for review holds that the acts charged against the accused were *unlawful acts from which the law infers malice and further that they could not be justified on the ground of trade competition. In other words, that malice was conclusively presumed as it is from any unlawful act wilfully done.* (This contradicts the decision on habeas corpus in the same case.) Let us see what further this means. Does it not affirm that under the statute in question the exercise of the right of liberty to contract, or what is the same thing, the right to refuse to contract with any person whom they choose and on what terms they choose is in Wisconsin a legal wrong, an unlawful act which cannot be justified upon the plea of trade competition if some other person lose trade on account of such refusal. Is not this incorrect as law and unconstitutional by all the authorities? It seems to us that nothing more than the foregoing statement is necessary to bring about a reversal of the several judgments of conviction. But because a rehearing has been ordered we feel bound to present this case from every viewpoint which so far as we can see could in any event be considered relevant. To hold that in law a person or class of persons possesses a legal or constitutional right, but shall be responsible in damages to every other person and to the public criminally in cases where loss or damage ensues to another from the exercise of that right, is to hold that every legal right is a legal wrong. Because this is always and in all places the criterion of a legal wrong, viz: that he who commits it is liable to respond in damages to any person suffering loss of which that individual act is the proximate cause.

VII.

CONSPIRACY.

It may be proper to consider briefly and as accurately as possible the common law of criminal conspiracy in considering its effect upon the nature of the act charged in the information.

The common law against criminal conspiracy prohibited a combination or agreement (1) for the purpose of effecting or carrying out any act by unlawful means, and (2) for the purpose of effecting or carrying out an unlawful act by any means. The distinction between (1) and (2) from the viewpoint of common law pleading was considered important, but otherwise it is merely verbal and unsubstantial. Because in (1) as well as in (2) there is an agreement to do an unlawful act, the only distinction being that in (1) the unlawful act agreed to be done is incident to the main purpose of the agreement while in (2) the unlawful act agreed to be done is the main purpose of the combination. In either case the subject of the prohibited agreement is unlawful, either as a means or as an end. But great uncertainty and some confusion exists both in this rule and in its application by the Courts, growing out of the use of the word "unlawful." For that word might denote what Blackstone terms a "public wrong," that is to say, a crime or misdemeanor, or it might denote what the same author terms "a private wrong." It might even cover a breach of some duty owing to another person, as the duty of a master to furnish his servants with reasonably safe appliances, or a duty raised by contract, as that of a warrantor to make good his warranty. Or it might denote a mere civil trespass. The word "unlawful" might also mean not alone criminal or indictable outside of and independent of the law of conspiracy, but also be taken to include acts injurious to the public (public wrongs) which are not crimes or misdemeanors nor indictable under any rule of statute or common law outside of the common law of conspiracy. There are many such cases. In these the Court undertakes in each case as it comes up, by the process of special inclusion and exclusion to determine whether the act concerning which the

prohibited agreement is made is "unlawful." This is much the same manner in which questions of fraud are decided and much the same manner in which that part of the criminal common law not based upon early statutes was brought into force. (1 Wharton's Criminal Law, Tenth Edition, Chapter 2.) The Courts are reluctant in such cases to lay down rules or limitations, but one limitation is constant and invariable in all criminal prosecutions, viz: the act under consideration must be one which affects the public injuriously as subversive of morals, public peace, liberty, injurious to trade or some other public interest. Where the prohibited agreement concerns the doing of an act which is a mere private wrong, a civil trespass or a breach of duty and only in that sense is unlawful, there is in the nature of things in the law of criminal conspiracy always this limitation: that the agreement will not constitute a criminal conspiracy unless the public interest be also injuriously affected by the commission of the act intended or agreed upon, either as a means or an end. Whenever the Court declares any combination or agreement a criminal conspiracy it, of course, affirms that public interest is injuriously affected by the act agreed to be done or by the association or combination. *State vs. Glidden*, 55 Conn., 46; 8 Atlantic Rep., 90, is a good illustrative case. There the defendants were informed against for conspiracy to injure and oppress the workmen then in the employ of a certain corporation by depriving them of their employment by means of a boycott, and a conviction on this information was sustained. In this respect the conspiracy was to do an act injurious to the private rights of the workmen, but it was of such character, threatening the peace of the community, and so widespread and formidable in its organization by reason of numbers, that it also affected the public; and consequently the Court pronounced it a criminal conspiracy. But the Court also said: "Suppose two or more boys, for instance, agree to go upon another's land. The proposed act is, or may be, a trespass and therefore unlawful. If they do not go no harm is done. If they do go they are or may be liable civilly, but no one would seriously contend that in their case they

would be liable criminally for conspiracy. But suppose two or more conspire unjustly to deprive another of his liberty or property. Then, as we shall hereafter see, the criminal law may take cognizance of the act." This commends itself to reason and shows that there may be conspiracies to do some unlawful act which have in them no element of *public wrong* and therefore cannot be prosecuted criminally and can only be prosecuted civilly in the action of conspiracy *if damage results*. Some Courts, adhering with great honesty of purpose to the pleasing fiction that Courts do not make law but only declare the law, have ruled that the unlawful act which is the subject of agreement must be itself and by some rule of law outside of the law of conspiracy laid down in the particular case, a crime or a misdemeanor. In the opinion of Mr. Wright (Criminal Conspiracy, Section 14) the weight of authority sustains this view. But be this as it may, this view of the law possessed the merit of certainty and the demerit of inadequacy. It had no doubt in some degree this characteristic of all early law, the product of conditions in which trade relations are less complicated and in which liberty is prized above ease and absolute safety. Other Courts have, however, ruled that the unlawful act which is the subject of the prohibited agreement need not be a public wrong but that it will be sufficient to constitute the offense of criminal conspiracy that the act concerning which the agreement is made violates some private personal or property right of a third person, as is said in *State vs. Buchanan*, 5 Harr. & J., 317. This latter proposition carried out to its logical conclusion would result in making every breach of duty imposed by law for purely private ends, or every breach of contract by two or more who were jointly and severally bounden either by the duty or by the contract, indictable as a public wrong; while where only one was bounden to a like duty or a like contract his breach thereof would be a mere private wrong. Other elements of uncertainty were introduced when it was held that the unlawful act which was the subject of the prohibited concert or agreement might be an act which was wrongful in the sense of being a public wrong if agreed upon

by two or more, although not indictable outside of the common law of conspiracy, in case such act was "by reason of the power of the combination particularly dangerous to the public interests," or, "particularly injurious to some individual." *Commonwealth vs. Waterman*, 122 Mass., 43, and cases, pages 57 opinion.

And an immoral act, not indictable if committed by one, when committed by numbers in pursuance of a common object *so it becomes dangerous to the public interests*, constitutes an unlawful act and an agreement or association for the purpose of effecting such act becomes criminal. *State vs. Burnham*, 15 N. H., 396.

Some of these extreme views are criticised in *2 Wharton's Criminal Law*, 10th Edition, Section 1338, Chapter 21.

Now under the most far reaching decisions on the common law of conspiracy and granting the power of the Courts as claimed by Wharton to declare an act a misdemeanor which is injurious to the public interests although no statute or precedent has prior to that time so declared, still there are at least two limitations to be observed. First, no legislature and no Court could declare the exercise of a right secured to any person by the constitution a misdemeanor *where the proper or legal exercise of that right involves co-operation in order to carry it out*, such as the right to contract or the right to compete in business, because the Court could not declare this a misdemeanor because participated in by two or more, without denying or disaffirming that constitutional right. Second, whatever may be the power of the legislature, the Courts cannot pronounce an act a misdemeanor unless it affects some public interest injuriously. We contend that we come in the case at bar within both these exceptions to the far-reaching power of the Court in conspiracy cases. The right of liberty to contract and to engage in trade and business necessarily involves combination and co-operation. As quoted in a former brief filed herein from the proceedings of the American Economic Association of 1899, pp. 78-173, at page 109:

"There is no clear dividing line between individual and "group competition. In a certain sense it may be said that "there is no individual competition, since the competing person "always draws aid and comfort of one sort or another from "other persons. So far as man is social and not merely animal "he is the center and in a sense the product of a complex web "of relations and influences from which he can in no way be "separated unless by death. By group, however, is ordinarily "intended in this connection a definite association with distinct "purposes and organization. One of the chief purposes of the "creation of such groups is to compete more effectually."

So that if there is a constitutional right of liberty to contract and to enter into trade relations and to carry on business and to enter into competition in trade, *that constitutional right involves the right of concert, association, combination* for that purpose, and cannot be punished as a common law criminal conspiracy *because in the nature of things the combination and association is essential to the exercise of that constitutional right.*

In the case at bar it is also difficult to discover any public wrong. That the complainant might on account of the combination in question be required to recede from its raised prices cannot be considered a public wrong unless it could be thought that the public was more interested in the alleged oppression of the Journal, which oppression consisted in enticing away its advertising customers, than the same public was interested in the question of rates. But it may be answered that the public interest is that no group of men shall exercise their right of competition from malicious motives or from other than selfish motives. This claim, however, would be fatal to the judgment in question because it would render either this particular right or any other constitutional right that the legislature might next seize on capable only of exercise when the motives accompanying its exercise were approved by the jury.

As we understand it, the learned Attorney General must admit and does admit that either one of the accused acting alone had the right under the Fourteenth Amendment to the United States Constitution to proclaim and insist that he would

make no contracts of advertising for hire with any person who patronized the Journal and paid its increased prices, unless such person would pay him three times that sum and that his motives in so doing would be immaterial and could not be inquired into.

But it is claimed, as we understand it, that the accused could not associate themselves together for the same or a similar purpose without becoming liable to criminal prosecution. The nearest he can come to supporting his claim by authority is, "that there are many things lawful when done by one alone which become unlawful when done by many in pursuance of a combination for that purpose." If this is true what of it? Competition and trade contracts is not one of these "many things" because *concert of action, association and combination are absolutely essential to the exercise of the right of "liberty to contract" as well as to the exercise of the right to engage in competition.* His contention is thus reduced to absurdity. The right of liberty to contract, which includes the right to contract with whom he pleases, on what terms he pleases, and to refuse to contract with whom he pleases, can only be exercised alone and not in connection with others interested in like contracts and engaged in the same business, and the vague statement above quoted from the common law of conspiracy is paramount to the constitution.

This statement above quoted from conspiracy cases has reference in cases of criminal conspiracy to the consideration of whether or not the act is a "public wrong" and when we find this statement used in civil actions for conspiracy it has reference to what the Court calls the extent of the damage but really refers to the question of whether or not the persuasion or solicitation of persons not to deal with the plaintiff has reached the extent to constitute a legal wrong analogous to the wrong committed by libel.

That the act of combining can never be considered a wrong or a crime when done in the exercise of a legal right or attempted exercise of a legal right which requires for its exercise

combination or cooperation notwithstanding a malevolent purpose is admitted in some of the cases by demurrer.

Orr vs. Ins. Co., 12 La. Am., 255.
Hunt vs. Simonds, 19 Mo., 583.
Anderson vs. U. S., 171 U. S., 604; 19 Sup. Ct. Rep., 50.
Docter vs. Riedel, 96 Wis., 158.
Bowen vs. Matheson, 14 Allen, 499.
West Va. Transportation Co. vs. Standard Oil Co., 30 W. Va., 611.
In re Grice, 79 Fed. Rep., 627.
Adler vs. Fenton, 24 How., 407.
Bohn Mfg. Co. vs. N. W. Lumber Assn., 21 L. R. A., 237.
For a very good illustrative case see *Kearney vs. Lloyd*, 26 L. R. (Irish), 268.
South Royalton Bank vs. Suffolk Bank, 27 Vt., 505.
Boyer vs. West. Union Telegraph Co. et al., 124 Fed. Rep., 246.

VIII.

DAMNUM SINE INJURIA.

It was not by chance or subtile invention that the rule of *damnum absque injuria* came into the Roman law and from that into the English law. In the nature of things there must be such principle in every system of law. It is the necessary result of rules, the necessary result of the establishment of rights. No human mandate can prevent loss. Loss must inevitably come from authorized acts or the exercise of legal rights as well, if not as often, as from unauthorized or forbidden acts. To attempt to hold the person doing such authorized acts liable for the *loss* caused thereby as for an injury would be to hold the act authorized by law unlawful where it caused loss and consequently *on a par with wrongful acts*. It is one thing to hold that he who in the exercise of his legal rights injures another shall respond in damages, because this supposes a clash of rights; but it is quite another thing to hold (as the Wis. Sup. Ct. did) that he who in the exercise of his legal right causes loss to another shall respond in the Courts for that loss, because this makes the exercise of the legal right

an illegal act by subjecting it to the same consequences as follow the commission of an illegal act and measuring it by the same criterion we employ in determining the quality of an illegal act. If the exercise of a legal right on the part of one could be said to cause an injury to another and we involve ourselves in no contradiction of terms thereby, the result is not that all legal acts become wrongful in the latter case, but that all legal acts become indifferent and may be exercised with impunity where they do not conflict with other legal rights and in the case of a clash of legal rights we do not see why each party should not recover from the other. One may be quite as "malicious" as the other. But when the Court pronounces an act such as the act of making a contract or refusing to make a contract or annexing conditions to a contract or engaging in trade competition, *illegal* and therefore punishable, it gives to the party who has sustained loss or injury thereby *a correlative right;* so far as the first party is adjudged guilty of a wrong the second party is adjudged the possessor of a correlative right. The consequence of this is that when the accused are punished for causing loss to the complainant by winning away its customers by a joint or concerted action in offering such customers the advantages hereinbefore described it is at the same time adjudged that the complainant had a legal right to maintain its trade and hold its customers against any such joint attack. We need not elaborate upon how destructive of competition that is and we have further discussed this question in the section entitled, "Equal Protection of the Law."

IX.

THE PLEA.

If we are wrong in our position that it appears upon the face of the information that the acts charged were acts of trade competition and did go beyond what is absolutely necessary to the exercise of the constitutional right of liberty to make lawful contracts with whom and upon what terms the accused choose, and that in such case the motive for refusing to con-

tract cannot be inquired into, then and only then the sufficiency of the plea of the accused to the effect that the acts charged were done in trade competition must be considered. We contend, of course, that this Court cannot reach the plea, because before it arrives at the plea and its sufficiency it must consider the information and that the information can only be sustained by denying a constitutional right of the accused. But if the liberty to refuse to enter into contract relations with another is not a constitutional right but a mere privilege and the right to engage in business in competition is not a constitutional right but a mere privilege which can in either case be exercised only when accompanied with proper motives or for ends or purposes which the legislature or courts of a state may think proper, surely even then there must be some justification permitted by the courts when a man is arrested for exercising such privilege. The justification here attempted was that of trade competition. Under this plea the defendants would have been allowed to prove the nature and extent of their business, their relations as competitors with the party who lost customers, the nature of the advantages which would result to them from their combination in a competitive way, and they could go further and if motive, purpose or malice in fact is any ingredient of the offense charged in the information, they could, under this plea, show they had no purpose outside of the trade competition, quoting from *Potter vs. U. S.*, 155 U. S., 438:

"As willful wrong is of the essence of the accusation, testi-
"mony bearing directly on the question of willfulness is of vital
"importance, and error in rejecting it can not be regarded other-
"wise than as material, and manifestly prejudicial."

See also *Felton vs. U. S.*, 96 U. S., 699.
Sherburne vs. Rodman, 51 Wis., 474.

But the accused were convicted on a demurrer admitting the truth of this plea. There can be only one interpretation placed on this decision and that is that in Wisconsin trade competition is no justification in a prosecution under the statute in question, even *where the only damage complained of is loss of customers.* That is to say, under this construction

of the statute in questioon if two or more business men were engaged in some business and combined their skill and resources and agreed not to enter into contracts of advertising for hire with those of their customers who divided their patronage with a competitor and paid such competitor certain recently raised rates, they will be liable criminally if by so doing they win away any customers from their competitor. More than this, even if the refusal to enter into contracts of advertising for hire with those who patronize a competitor and pay him his recently raised prices is not absolute but only conditional and the condition is such that the customer in such cases shall be required to advertise in all three associated papers and pay each rates equal to the recently raised rates of the competitor, so that the agreement only affects such advertisers as really desire the services of one or more of the associated papers and only tends to draw off from the competitor such advertisers as desire to go into one or more of the associated papers, so there can in no event be a loss to the competitor therefrom without a corresponding gain to the associated papers, still this condition will not make the transaction innocent nor can the act be justified *by any circumstances of trade competition.* Now as all competition is wilful and is intended to cause loss of business patronage to the unsuccessful competitor all competition is illegal in Wisconsin. This would seem to us rather incredible and were it not for the decision of the Wisconsin Supreme Court in *Hawarden vs. Youghiogheny Coal Co.,* 111 Wisconsin, 549, 550, we would be constrained to believe the decision to which the writ of error runs a blunder or an inadvertence. But it is not such. It is the deliberate judgment of the Supreme Court of Wisconsin, and we say that if the statute in question makes the act of co-operation in trade competition under the circumstances aforesaid a criminal offense and the act an unlawful act from which malice is conclusively inferred, that is to say, which admits of no justification without denying the facts aforesaid, it seems to us not only to be unconstitutional beyond all question, but very oppressive and unjust besides. There is a class of cases in England which holds

that certain injuries to business otherwise unlawful or at least actionable, can be justified if it be shown that the acts were done in trade competition. We do not think those cases apply or were ever applied to a case where the alleged wrongful act complained of went no further than an agreement among two or more interested parties not to deal with those who did not patronize them exclusively or merely to offer better terms to those who patronized these two or more persons exclusively. If the theory of justification is ever applied in such case last mentioned the liberty to contract is at an end. But we do not think it has been so applied but is applied rather to those indifferent acts which lie on the border line of the right of liberty to contract and are not essential to the exercise of that right and may be either acts of competition or acts of oppression and where the liberty of the opposite party is infringed and the advantage to the doer is remote. *Giblan vs. National Amalgamated Labourers' Union of Great Britain and Ireland*, L. R. 2 K. B. Div., 1903, page 600, is such a case. That was a case of preventing a workman from obtaining employment in order to compel him to pay a debt honestly due to the labor union. *Glamorgan Coal Co. vs. South Wales Miners' Federation*, L. R. 2 K. B. Div., 1903, page 545, is another. That was a case of the intentional interference with contractual rights by inducing workmen to quit work for a time contrary to an existing agreement. In *Martell vs. White*, 69 N. E. Rep., 1085, elsewhere commented on in this brief, the same view of necessity for justification is suggested or decided in the case of a voluntary association imposing heavy fines on those of its members who entered into contracts with the plaintiff. The necessity for justification is mentioned in cases cited in *Martell vs. White supra*. In some of the last-mentioned cases it is recognized that trade competition is a justification in cases where *injurious* acts were really done in the exercise of that right. While disclaiming that the acts charged in the information against the accused were such acts as require any justification, because they were legal acts and inflicted no *injury* in the legal sense of the latter term, yet if we were mistaken in this and the acts

charged belong in the same legal class with the acts committed by the defendants in *Martell vs. White, supra,* for example, then the rights of the defendants were denied by the Wisconsin Supreme Court when it refused to permit the defendants to justify under a plea that the acts were done in trade competition and the judgment of the Court below must be, for this cause alone and on this ground alone, if on no other, reversed.

X.

THE CONSTITUTIONAL QUESTION.

We have endeavored to show in Chapter I. of this brief the nature and character of the rights claimed here by the accused and how such rights were regarded by the Courts, incidentally covering in this showing the following cases holding statutes unconstitutional which denied or unduly restricted such rights.

Niagara Ins. Co. vs. Cornell, 110 Fed. Rep., 816.

State vs. Julow, 29 L. R. A., 257.

People vs. Gillson, 109 N. Y., 389; 17 N. E. Rep., 343.

In Chapter II. of this brief we have endeavored to present a review of the statute in question and of the contents of the information. In Chapter III. we have endeavored to sustain the proposition that the acts charged in the information were acts of recognized and legitimate trade competition, that a direct and certain benefit resulted therefrom to the accused and that these acts were of such character that their denial involved an encroachment upon the liberty to contract of the most serious nature. In Chapter IV. we have endeavored to show that to punish one for refusing to contract or for annexing conditions to his refusal on the claim that such refusal was malevolent in fact or malicious in law, would destroy the liberty to contract by striking at such liberty in a most vital point. In this chapter we run across the following cases, cited there to sustain the argument of that Chapter but also involving questions of Constitutional Law, viz:

Coffeyville Etc. Co. vs. Perry, 76 Pac. Rep., 848.

State ex rel. Zillmer vs. Kreutzberg, 114 Wis., 530.

Allgeyer vs. Louisiana, 165 U. S., 578.
Wallace vs. Rd. Co., 94 Ga., 732.
People vs. Warren, 34 N. Y. Supp., 942.
Com. vs. Perry, 155 Mass., 117; 28 N. E. Rep., 1126.

In Chapter V. we have endeavored to set forth the true grounds upon which the illegal strike cases and boycott cases rest and to show that they are not based upon mere malevolent purpose but the acts committed are unlawful because not necessary to the exercise of a right which the law gives the doer and at the same time invading a legal right of liberty to contract or some analogous right which the law gives the other party. In Chapter VI. we have endeavored to show that it was never considered lawful or proper to inquire into the motives with which a person did certain acts necessary to the exercise of a legal or constitutional right possessed by him because such inquiry impaired or destroyed that right but that such inquiry was sometimes made with regard to indifferent acts, that is acts legal merely because they were not forbidden by law. In Chapter VII. we have endeavored to show that by the common law of conspiracy the act of combination or the agreement to combine can never be an offense when the act is in pursuance of a legal right which legal right for its exercise requires co-operation or combination.

We have now in the light of the cases and principles aforesaid to present the question directly with reference to the mandate of the Constitution that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.

If it is true that it is an essential part of the constitutional right of liberty to be free to singly or together form contract relations with whom one pleases and refuse to form contract relations with whom one pleases and this right is denied or even impaired by construction given to the Wisconsin statute in question, then of course a constitutional question arises upon which the Court should reverse the judgment below and hold the statute thus construed unconstitutional. Of course to re-

fuse contract relations and annex conditions to that refusal is the whole basis of the right to contract. Every contract consists of a refusal to contract except on the conditions made by one and acceded to by the other party. Most of the authorities hold that refusal to contract or the condition annexed to such refusal may be, as said by Cooley, the result of, "whim, caprice, prejudice or malice." Can the Supreme Court of Wisconsin say *the conditions annexed to the refusal to contract must be such as are beneficial to the person refusing?* We answer, not if there is such a thing as liberty of contract; because this paternalistic regulation of the refusal to contract is not liberty to refuse, but a denial of the person's right to refuse to contract, in all cases where the Court (or the legislature) may think that a loss (not an injury) will result to some third person therefrom and no advantage to the person refusing. If this is "liberty" what is "paternalism"? The Court will observe we put it, for argument, more strongly against ourselves above than the facts here warrant, because we assume a case where there is no benefit accruing to the person or persons from his or their refusal to contract or from the conditions which they annex to their refusal, which is not the actual case here, although it was the hypothesis upon which the Supreme Court of Wisconsin decided this case.

Again the legislation of Wisconsin in question, as construed by its Supreme Court, declares this refusal to contract except on condition, when the condition causes loss to another and is not beneficial to the person making the condition, an unlawful act from which malice is inferred and so brings the act within the terms of the statute, Section 4466a. This is precisely the same in its effect upon the right of liberty to contract and in its effect upon the accused as if the statute in question by express words covered the case in question. *Whatever acts the Court of Wisconsin could declare malicious of course the legislature of Wisconsin could declare malicious and we submit that it is also true by reason of the constitutional rule governing both the Court and the legislature of Wisconsin that whatever acts the legislature of Wisconsin could not declare ma-*

licious the Court of Wisconsin could not declare malicious. It is also true that a legislative declaration that an act is unlawful is equivalent to a declaration that that act is malicious in law, and that a legislative declaration that a certain act is malicious is the exact legal equivalent of a legislative declaration that the same act is unlawful in its effect to forbid or prohibit the act. The same result—punishment—follows its commission. So that declaring an act unlawful by statute is equivalent to declaring its wilful commission a malicious act and declaring a certain act done in a certain way to be malicious in law is the exact equivalent of declaring it unlawful.

Hence could the legislature or the Courts of Wisconsin or the legislature and the Courts of Wisconsin declare: *"It shall be unlawful for two or more persons to associate together and refuse to enter into contract relations with third persons basing that refusal upon any condition which may cause loss (not injury) to such third person and does not benefit such two or more persons."* This we submit is a correct statement of the rule laid down in the instant case by the Supreme Court of Wisconsin.

To put this in another way: The illegal features found by the Wisconsin Court in the acts of the accused are (1) that two or more associated in the refusal; (2) that there was a refusal to contract except upon condition; (3) that the condition so annexed to the refusal tended to cause loss of customers to a competitor; (4) that the condition annexed to the refusal did not benefit the persons refusing; (5) that the refusal and condition were made known. We only dispute (4) as incorrect in fact. But even on the hypothesis that each proposition above numbered is correct, which of the foregoing could be prohibited without denying the liberty to contract and the liberty to engage in trade and carry on competition? Are they not each acts vital to the enjoyment of these rights and *necessary to their exercise?* Could the legal right to contract or refuse to contract be exercised if you prohibit (1)? (2)? (3)? (4)? (5)? Would it be possible to say there was such a thing as liberty to contract if you prohibit the combination of all?

A statute of Missouri quoted in the statement in *State vs. Julow*, 129 Mo., 163; 29 L. R. A., 257; made it a misdemeanor for any employer to enter into any contract with an employee requiring the latter *to withdraw from any trade union, labor union or other lawful organization, or to require said employee to abstain from attending any meeting of the people called or held for lawful purposes or to by any means compel or coerce any employee into withdrawal from any lawful organization or society.*

Notice that all the acts forbidden to be prohibited by the employer were acts which the employee had a legal right to do. Just as the Journal had a legal right to raise its prices or the advertising traders had a legal right to patronize the Journal and pay the increased price if they chose to do so. But the statute did not merely make it a misdemeanor for the employer to prevent his employee from doing these lawful acts, it went further and forbade the employer *to enter into any contract or agreement* requiring the employee to desist from the exercise of these lawful acts. This made the entering into such contract a wrongful or illegal act by express enactment while the Wisconsin statute under consideration here, as construed by the Supreme Court of Wisconsin accomplishes the same result, but more indirectly by declaring such act fraught with legal malice and therefore unlawful. The Missouri statute declared an act necessary to the exercise of the liberty to contract unlawful, hence malicious. The Wisconsin statute (as construed) declared the same kind of an act malicious, hence unlawful. This is a mere difference in words. The effect on the right of liberty to contract is the same in either case, viz: to impair or prohibit such right; the condition annexed is the same in either case, viz: that the person in question will refuse contract relations except on condition that the other party forego a right of his.

The Missouri Court held this statute unconstitutional as depriving one of his liberty to make contracts and that it could not be considered a police regulation because it did not promote or tend to promote the public health, welfare, comfort or safety

and that even if it had such tendency the state would not be allowed under the guise and pretense of a police regulation to encroach or trample upon the just rights of the citizen which the constitution intended to secure against diminution or abridgement.

The Court rests this decision upon the following cases:

State vs. Loomis, 115 Mo., 307; 21 L. R. A., 789.
Com. vs. Perry, 155 Mass., 117; 14 L. R. A., 325.
Godcharles vs. Wigeman, 113 Pa. St., 431.
State vs. Goodwill, 33 W. Va., 176; 6 L. R. A., 621.
Re Jacobs, 98 N. Y., 98; 50 Am. Rep., 636.
People vs. Gillson, 109 N. Y., 389.
Millett vs. People, 117 Ill., 294; 57 Am. Rep., 869.
Ritchie vs. The People, 155 Ill., 98; 29 L. R. A., 79.

The foregoing cases we submit fully sustain the decision in *State vs. Julow, supra,* and this latter case we submit is directly in point here. The State of Missouri certainly had or could have as great an interest from the standpoint of state policy or police power in legalizing labor organizations as the State of Wisconsin could have in sustaining existing business concerns against loss of customers. The loss caused to the discharged employee in *State vs. Julow, supra,* was the loss of an opportunity to earn money working for hire, the same kind of loss complained of by the Journal here. The right of the employee invaded in *State vs. Julow* was one recognized by the law while the right of the Journal in the case at bar is not to the same extent recognized by the law. The refusal to continue contract relations was the same in either case, in that it was a refusal except on condition. The condition of the refusal to continue contract relations in *State vs. Julow* was one which required the employee to forego the assertion of a right on his part, but this is true of all contracts. The refusal to continue contract relations in *State vs. Julow* was on condition that the person refused forego some right of his which it would cause him loss to forego and there was no immediate or apparent benefit to the employer in insisting on this condition; at least none that the Wisconsin Supreme Court could see. In the case at bar the refusal to continue or enter into contract relations

was conditioned upon the advertiser employing all three accused, or else refusing to employ the competitor of accused at its higher prices, and was advantageous to the persons making the condition and as we have seen besides was done in competition. But this case of *State vs. Julow, supra,* discloses also that it is essential to the liberty of contract as stated by Cooley that it be held that one may refuse on any condition he chooses to impose or absolutely without giving any reason therefor or from "whim, caprice or prejudice." Because in the Julow case the decision necessarily covers the proposition that it is essential to the liberty of contract that one may refuse to enter into contract relations without being called upon to give any reason for refusal. It covers this because it covers the proposition that no law is valid which makes illegal the refusal to contract with one unless the latter will surrender some legal right, no matter whether the power of the state declares that there is no benefit accruing from such refusal, or from such condition annexed to such refusal; and covering this it covers all minor considerations included therein. If the *State vs. Julow* was correctly decided then the case at bar was incorrectly decided by the Wisconsin Supreme Court, because precisely the same points are involved which summed up may be stated thus: The state has power (case at bar) has not power (*State vs. Julow*) to declare what shall not be sufficient reasons for refusing to enter into contract relations with another.

A statute providing among other things that no person shall discharge an employee because he is a member of any labor organization was held unconstitutional on similar grounds in *State ex rel. Zillmer vs. Kreutzberg,* 114 Wis., 530. The case is in point here for the reasons aforesaid. Many authorities are cited, among them the following decisions of this Court to the limitations on the police power:

Mugler vs. Kansas, 123 U. S., 623, 661; 8 Sup. Ct. Rep., 273.

Lawton vs. Steele, 152 U. S., 133; 18 Sup. Ct. Rep., 499,

and also the statement hereinbefore quoted from Mr. Cooley's work on torts, and says (op. p. 540):

"*Free will* in making private contracts and even in greater "degree in refusing to make them is one of the most important "and sacred of the individual rights intended to be protected. "That the present act curtails it directly, seriously and prejudi- "cially cannot be doubted."

Is not the foregoing also true of the statute 4466a as construed in the case at bar?

Does it not "curtail" free will in making private contracts to a much greater extent, reaching not only the contract of labor but all other contracts to declare that all refusal to contract except on conditions causing loss to another, shall be criminal because malicious, than it does to declare that the single contract of labor shall not be terminated or refused for a single specified insistence of the laborer in what is his lawful right?

To the same effect and covering the same question is *Coffeyville, etc., Co. vs. Perry*, 76 Pac. Rep., 848.

The statute here held unconstitutional was in somewhat different language and was evidently drawn with a view that joining a labor organization was a rightful and lawful act and hence the employee had a right to perform that act free from coercion and *that the state could make any act of coercion of this kind a misdemeanor*. And so far the draughtsman of the statute was probably right. But when he came to provide that discharge or threats to discharge should not be used for this purpose he went too far. Because he then invaded the liberty to contract and undertook to punish a man for refusing, or refusing to continue, contract relations *for what the legislature thought an insufficient reason and declared to be an insufficient reason causing loss to the employee*. This decision shows that Cooley was right when he said "whether the refusal rests upon reason or is the result of whim, caprice, prejudice or malice," it is still within the person's constitutional right.

For if the legislature can constitutionally say that it shall be a misdemeanor to coerce another to forego a lawful right, but cannot constitutionally say that a person shall be punished for refusing to contract with another unless that other forego

such right, does it not follow that the legislature cannot make the refusal to contract a misdemeanor on any ground, much less on the ground that such refusal caused loss to another and brought no good to the person refusing?

In *Gillespie vs. People*, 188 Ill., 176; 52 L. R. A., 283; a like statute was held unconstitutional.

Here the offense consisted in an employer who needed and was employing men, refusing contract relations of this kind with one who applied for work on the ground that the latter was a member of a labor union. The Court said *inter alia:*

"The legislature cannot prevent persons who are *sui juris* "from laboring or from making such contracts as they may see "fit to make relative to their own lawful labor; nor has it power "by penal laws to prevent any person *with or without cause* "from refusing to employ another or to terminate a contract "with him."

The contract of "advertising for hire" is really a contract for labor and services and the constitutional question depending upon this writ of error is answered by the foregoing decisions on several points, (1) as to the disability of the legislative body under the constitution to enact such laws, (2) that such laws are not a lawful exercise of the police power, (3) the scope of such law goes beyond what can be justified under the police power of the state.

Turning to other contracts and bearing on the scope of restriction with reference to an act of the legislature making it a penal offense for a merchant to sell off his stock of goods in bulk, see *Block vs. Schwartz*, decided by the Supreme Court of Utah, March 22nd, 1904, reported 76 Pac. Rep., 22. The statute was held unconstitutional as restricting the liberty of making contracts under the Fourteenth Amendment to the Constitution of the United States.

People vs. Gillson, 109 N. Y., 389; 17 N. E. Rep., 343; declaring a statute void, might be referred to under the general head of liberty to make all lawful contracts or liberty to engage in trade competition and is authority for the proposition that the legislature has no power to prohibit a certain kind of

lawful contracts which might be said to be a species of competition disapproved by the legislature.

Street vs. Varney Electric, etc., Co., 160 Ind., 338; 66 N. E. Rep., 895; holds a statute unconstitutional which fixed a minimum wage of twenty cents per hour on all work for municipalities.

When we leave the constitutional ground of liberty to contract and view this statute from the viewpoint of the cognate constitutional right to engage in trade and carry on competition, we find the authorities (although mostly decisions on common law questions because there has been fewer attempts to pass statutes restraining competition) to the same effect. The freedom to engage one's faculties and property in business is upheld and secured by the Fourteenth Amendment to the Federal Constitution against adverse action by the state, speaking through any of its agencies, executive, legislative, or judicial.

For example of a statute held unconstitutional because it interfered with the liberty of contract by imposing penalties for co-operation in matters of trade and contract see *Niagara Fire Ins. Co. vs. Cornell*, 110 Fed. Rep., 816; *Greenwich Ins. Co. vs. Carroll*, 125 Fed. Rep., 121; *State vs. Dalton*, 22 R. I., 77; 46 Atl. Rep., 234; 48 L. R. A., 775.

"It is not enough to bring a given business within the pro-"hibitory power of the legislature that it is so conducted as to "seriously interfere with or even destroy the business of "others." *State vs. Dodge*, 56 Atl. Rep., 983.

Cases declaring the right to engage in competition and that losses caused by acts of competition are *damnum absque injuria*, but not involving the constitutionality of any statute are found in the first and second chapters of this brief. We concede that the presumptions are in favor of the judgment below and that unless the act in question as construed by the Wisconsin Supreme Court (1) clearly interferes with the liberty to contract or refuse to contract, and (2) is clearly outside of the police power of the state as limited by the constitution the convictions below must be affirmed. But we contend that both conditions (1) and (2) aforesaid are shown to exist. If the con-

struction given to the act in question made it applicable only to a particular class or kind of contracts which might be used as a cover for fraud or gambling and did not go beyond what was necessary to prevent such evil, as in *Booth vs. Illinois,* 184 U. S., 425; 22 Sup. Ct., 425; then the statute might be sustained. But as the state under its police power could not punish one for refusing to employ another because that other was a member of a labor union without denying the generality of the proposition that persons may refuse to contract with whom they please and on what grounds they please, so the state under its police power could not punish a person for refusing to contract with one who patronized a competitor without the same broad general limitation on the right to refuse to contract. Nor could the state in the exercise of its police power prohibit combination or co-operation for purposes of trade or for the purposes of making contracts because these fall without the objects for which the police power can be lawfully exercised.

State vs. Santee, 53 L. R. A., 763, and cases in note.

We submit that this legislation as construed in the decision here for review cannot be upheld without destroying the liberty to contract, not alone to make a particular kind of contract, but all contracts which by any legislation or decision may be pronounced "malicious" because loss may be caused to another and no perceptible (to the Court or jury) gain to the party contracting and that over and beyond this the decision is not only destructive of a particular kind of competition, but all competition, because (1) all competition causes loss; (2) all competition is co-operative and by association; (3) all competition engenders enmity and often malevolent purpose.

XI.

DENIES THE EQUAL PROTECTION OF THE LAW.

The state law as declared by the Supreme Court of Wisconsin not only makes all competition criminal where the jury may find an improper motive behind it (because all competi-

tion is necessarily co-operative and necessarily unkind, and a conspiracy in this sense could be predicated of every imaginable case of competition), but it also denies to persons in that state the equal protection of the laws. Because that law as declared by the Supreme Court of Wisconsin says to A and B who have little trade patronage and associate and agree to acquire more, and to C and D, who have no trade patronage and associate and agree to acquire such patronage: "You shall not act together for the purpose of resisting by group or co-operative competition a raise of prices made by E and F who have and are enjoying trade patronage because winning away the customers of E and F is an '*injury*' to E and F." At the same time it says to E and F: "You may combine and act together to keep and hold the trade patronage which you have. Not only this, but you may invoke the criminal laws against A and B or C and D to protect you in your raise of prices and in holding the patronage you have." Consequently the equal protection of the laws is denied. Those who have not trade patronage and would strive for it, or those who have little trade patronage and would seek for more, cannot combine, associate or concert together to acquire it. While those who are enjoying large or sufficient trade patronage may combine, associate and concert together to keep it. This is an inadmissible basis of classification. If there were an absolute right of property in trade patronage, or if the business association in the field and enjoying patronage had a different right to it in the law from the newcomer, this classification into those who have and are not within the statute, and those who have not and are within the statute might be valid. But there is no property in the sense of exclusive right in anyone to the enjoyment of trade patronage. *Consequently there is no permissible legal basis of classification for the purpose of making guilty those who act together to win away a portion of it and not guilty those who act together to retain it.* Under this rule of law against which we are contending *the same acts which will constitute a criminal offense by the one class who have not patronage will not constitute a criminal offense by the other class who already have trade pa-*

tronage. This is no fanciful condition of things, but the direct and immediate result of the Wisconsin decision is to establish this rule. For is not this the real tenor and effect of their decision overruling the plea of the accused? Is it not elementary law that every rule denouncing an act as wrong establishes a correlative right? Limit the decision as much as we can and yet it establishes the right of a person in trade having customers to hold them against an association who seek to win those customers from him by offering prices, discounts or other advantage for the exclusive patronage of such customers. This on the theory that the rule established is that the act was wrongful, hence legally malicious. On the other hand, if the rule established could be said to be that it is only malice in fact that makes the acts of the accused a legal wrong, then we have established the right of one that has customers and has trade to hold them against any competition which he is able to convince a jury is malicious in fact. Whether the decision of the Court below be sustained on one or the other of these grounds, it establishes the right in a party owning an existing trade or business and having customers. In the first case, that is really the case at bar, where the Court decided that legal malice was to be inferred from the act of enticing away those customers, the decision establishes a right to hold those customers as against any such efforts as were made by the associated newspapers in this case.

A situation somewhat analogous to that in the case at bar on this point developed in the case of *Cote vs. Murphy*, 159 Pa. St., 420; 28 Atl. Rep., 190. There the Court said of the combination:

"It was not made to lower the price of wages as regulated "by the supply and demand, but to resist the artificial price "made by a combination which by statute was not unlawful; "(2) the methods adopted to further the objects of the combina- "tion were not unlawful."

The Court touches upon, but does not directly decide, this question. It says:

"If there be nothing criminal in a combination to artificial-
"ly raise wages, there can be nothing criminal in an employer's
"combination to resist the advance or to artificially depress
"them."

Why not? Manifestly because to make one act criminal and the other innocent would be to deny to the parties the equal protection of the laws. It is not what the Courts say argumentatively that constitutes the rule of law established by judicial decision, but what they decide. The decision complained of here lays down the rule that two or more cannot co-operate in competition against another business group to "injure" the latter group by winning away their customers. This establishes that the latter have a legal right to co-operate to retain their patrons or customers because their retention of such customers does not take them away from those who have them not, therefore does not "injure," while the other class, viz: those who have not trade patronage or customers, will be criminally liable for the same kind of combination and the same acts directed to acquiring new customers. If it has this effect the statute is invalid.

Connolly vs. Union Sewer Pipe Co., 184 U. S., 540.
Mathews vs. Illinois, 202 Ill., 389.
Louisville vs. Louisville, 14 L. R. A., 579, and note.

Respectfully submitted,

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W. H. TIMLIN,
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APPENDIX.

Section 4466a, Statutes of Wisconsin of 1898, provided as follows:

"Any two or more persons who shall combine, associate, "agree, mutually undertake or concert together for the purpose "of wilfully or maliciously *injuring another in his reputation, "trade, business or profession by any means whatever*, or for the "purpose of maliciously compelling another to do or perform "any act against his will, or preventing or hindering another "from doing or performing any lawful act, shall be punished "by imprisonment in the county jail not more than one year or "by fine not exceeding five hundred dollars."

From *Aikens vs. State*, 113 Wis., 419, op. 420:

"Marshall, J.: From the foregoing statement it appears "that all the questions raised in the Court below by plaintiffs "in error were considered and decided against them in *State ex "rel. Durner vs. Aikens*, 110 Wis., 189; *State vs. Huegin*, Id; and "*State vs. Hoyt*, Id. The trial court followed that decision, as "it was bound to do. As we understand the matter, the in- "formation contains the same charge as the one set forth in the "complaint, the plaintiffs in error in effect pleaded guilty there- "to, admitting the doing of all the acts charged against them, "and they were thereupon duly adjudged guilty and sentenced. "In that view the judgments must be affirmed, as all questions in "regard to the matters are *res adjudicata*, as before indicated.

"By the Court: The judgment as to each of the plaintiffs "in error is affirmed."

From opinion in *State ex rel. Durner vs. Aikens et al.*, 110 Wis., 189:

E. R. HICKS, Atty. Gen.; HOWARD VAN WYCK, Dist. Atty.; A. C. UMBREIT, Asst. Dist. Atty.; WINKLER, FLANDERS, SMITH, BOTTUM & VILAS, and W. H. AUSTIN, for plaintiff in error.

VAN DYKE, VAN DYKE & CARTER, for defendant in error Huegin.

W. H. TIMLIN, for defendant in error Aikens.

N. S. MURPHEY, for defendant in error Hoyt.

MARSHALL, J. (after stating the facts). Because of the long delay in announcing the decision in this case it is deemed proper to say, as a justification therefor, that the number and importance of the questions involved were such that the case seemed to call for the most careful study by each member of the court which the amplest opportunity therefor would permit, and to require that a decision should be rendered only when it could embody the best judgment of each such member, if that result could be reached within such time as not, by reason of the delay, to materially prejudice the administration of justice. There is room for congratulation that the purpose of the long deliberation upon the case has been accomplished. To circumstances which were unavoidable, preventing that full discharge of official duty, as regards individual study of the case, which was desired prior to settling upon the final conclusions, the delay must be in the main attributed. The questions legitimately discussed by counsel are so numerous that in the preparation of the opinion a choice had to be made between stating mere conclusions with appropriate supporting authorities, and discussing such questions at length. By the former method a brief opinion would have sufficed to cover the case; by the latter a lengthy opinion was unavoidable. The former course would have required but little labor compared with the latter, but it seemed that the careful preparation of the case and presentation of it by numerous and able counsel for the respective parties could not be adequately responded to, so as to fairly indicate the appreciation felt here for the assistance received from such preparation and presentation, otherwise than by a pretty full discussion of each of the points decided which counsel upon either side deemed of sufficient importance to require them to present for that purpose. Acting upon that conviction we will discuss each of such points with sufficient fullness to satisfy all reasonable expectation and endeavor to make the

conclusions reached a definite declaration of the law, so that, in addition to adjudicating the rights of the parties to the suit, the result will be valuable, as regards each point presented, in guiding the courts and the profession in this state in future cases.

Opposition to the motion on behalf of the relator to be heard in this court by private counsel in his behalf, was based on the following grounds: (1) It involves consideration of one of the errors claimed to have been committed by the Court below which should only take place upon the consideration of the other errors. (2) The attorney general is required by section 163, Rev. St. 1898, to appear for the state and prosecute or defend all proceedings in the Supreme Court, in which the state is interested or a party, and that precludes appearance by private counsel in criminal proceedings, the law being the same as to the attorney general in the Supreme Court as it is as to the district attorney in the Circuif Court. (3) The sheriff is not a party and has no personal interest in the result of the review of the proceedings called in question by the writs of error. Each of such propositions involves an important question of practice, which is regulated either by statute or by the judicial policy of the state, and has received consideration resulting in the following conclusions:

1. If the sheriff of Milwaukee county by whom the state sued out the writ of error, is a party to the proceedings in this court and in any event is entitled to be heard as such he can not be denied that right because to allow it would be inconsistent with a ruling of the court below, sought to be reviewed by the writ of error. If he is properly here as a party, obviously, his rights as such can not be jeopardized by any decision made by the court below which is a subject for review on the writ of error. That seems too clear for reasonable controversy. If counsel's position be correct, no person denied the right to be heard in a trial court upon the ground that he is not interested in the controversy, can be heard on appeal from the decision except there be a judgment for costs against him, because recognition here to present his case would be a recognition of his claim that he was a party to the proceeding in the trial court.

We can not sanction that doctrine. The sheriff was the actor in suing out the writ of error. He appears at the bar of the court and asks to be heard by counsel. If he is a party to the proceeding he must be heard regardless of any incidental bearing the decision may have upon any question involved in the review of the proceedings upon the writ. Manifestly, if he was a party in interest in the habeas corpus proceedings, he was a party to the suit commenced in this court by the writ of error to review the result thereof, if he was bound thereby to his injury, to some appreciable degree, either directly and immediately or so that direct injury of some sort may probably come to him therefrom; in short, if he is "a party aggrieved." Our appeal statute on that point (section 3048, Rev. St. 1898) is no broader at most than the common-law rules governing the subject of parties in suits commenced by writs of error, or section 3043, Id. A writ of error lies in favor of him "who is a party to the record;" a man who "is aggrieved by an error in the foundation, proceeding, judgment or execution, in suit," said Justice Grier, in *Bayard vs. Lombard*, 9 How., 530, 13 L. Ed., 245, quoting from early common law writers. See, also, 7 Enc. Pl. & Prac., p. 856. That the relator here is a party aggrieved within the rule stated it seems is quite clear, but we will refer to the subject more at length in the discussion of the third proposition.

2. The second proposition assumes that proceedings to test the right of a person to his personal liberty are criminal in character and governed by the rule declared in *Biemel vs. State*, 71 Wis., 444, 37 N. W., 244; *State vs. Duff*, 83 Wis., 291, 53 N. W., 446, and other cases. Whether habeas corpus proceedings are in their nature civil or criminal we do not deem necessarily material. If the decision were to turn on that question, though, as at present advised, it would result in favor of the proposition that the remedy by habeas corpus is a civil remedy, as contended by the relator. The writ *ad faciendum, subjiciendum, et recipiendum* of the common law was the sole legal remedy of a person wrongfully restrained of his liberty. The purpose of a proceeding instituted by it was not to punish for the wrong-

ful act of restraining him of his liberty, nor did it concern, necessarily, the wrongful act causing his detention. It was confined to compelling the immediate human instrument of the unlawful restraint to restore his victim to liberty notwithstanding any charge made against him. The case cited to our attention by relator's counsel, *Ex parte Tom Tong*, 108 U. S., 556; 2 Sup. Ct., 871, 27 L. Ed., 826, opinion by Waite, C. J., states briefly and clearly the true nature of such proceedings, as they are uniformly regarded in the books: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of *habeas corpus* which he has obtained is not a proceeding in that prosecution. On the contrary it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process." In a later case, *Cross vs. Burke*, 146 U. S., 82, 13 Sup. Ct., 22, 36 L. Ed., 896, the Court, speaking by Fuller, C. J., said: "It is well settled that a proceeding in *habeas corpus* is a civil and not a criminal proceeding." So the authorities in this state, that it is the policy of the written law that no one but the public prosecutor or his assistant duly appointed shall be permitted to represent the commonwealth in criminal cases against the accused, do not extend to a civil action or proceeding in the nature of a civil suit commenced by the issuance of a writ of *habeas corpus*, because, if for no other reason, it is not a criminal suit. The law that makes it the duty of the district attorney of a county to appear and prosecute or defend all actions, applications or motions, civil or criminal, in the courts of his county wherein the state is interested or a party, except

for assault and battery (section 752, Rev. St., 1898), precludes legal services being rendered by way of assisting the district attorney in a civil matter at public expense. That has often been decided. *McDonald vs. Milwaukee Co.*, 41 Wis., 642; *Manitowoc, Etc, vs. Sullivan*, 51 Wis., 115, 8 N. W., 12; *Cutts vs. Rock Co.*, 58 Wis., 642; 17 N. W., 636; *State vs. Duff*, 83 Wis., 291, 53 N. W., 446; *Frederick vs. Douglas Co.*, 96 Wis., 411, 71 N. W., 798. But it has nowhere been decided that the state's attorney, either of the county or the state at large, can not obtain or receive assistance at his own expense or the expense of others in a civil proceeding. In *McDonald vs. Milwaukee Co., supra*, the sheriff employed counsel to defend against proceedings commenced by writ of *habeas corpus*. He made a claim against the county for his disbursements for such services. The claim was held invalid, because of the duty of the district attorney of the county to attend to such matters as a part of his official duties, made so by section 3433, Rev. St. 1898, which provides that when it appears from the return to a writ of habeas corpus that the person seeking to obtain his liberty is detained upon a criminal accusation, no order shall be made for his discharge until opportunity shall be given to the district attorney of the county to be heard, if to be found within the county; and because such provision is exclusive of the right of the sheriff to employ counsel at public expense. The case must be read in the light of what was under consideration, that is, the right of the sheriff to employ counsel at public expense. There is nothing in that to militate against a person other than the district attorney standing in court as the representative of the people in a civil action by consent of the public attorney. No judicial policy with which we are familiar is thereby violated, nor any constitutional right. Such a representative can not claim compensation for his services except as against the individual employing him. That is as far as the decisions of this Court go. No reason is perceived why a reputable attorney in a mere civil action can not be heard in court on behalf of the state by permission of the officer whose duty it is to stand responsible for the due protection of the public interests, without the violation

of any right secured by the Constitution or any law to the person standing in the capacity of an adversary to the public in the proceedings. It has been the universal practice in this state to permit private counsel in this particular class of cases, as is abundantly shown by the decisions cited by counsel for the relator. *In re Booth*, 3 Wis., 1; *In re Falvey*, 7 Wis., 630; *In re Pierce*, 44 Wis., 411; *In re Eldred*, 46 Wis., 530, 1 N. W., 175; *State vs. Noyes*, 87 Wis., 340, 58 N. W., 386, 27 L. R. A., 776; *State vs. Ryan*, 70 Wis., 676, 36 N. W., 823; *In re Rosenberg*, 90 Wis., 581, 63 N. W., 1065, 64 N. W., 299.

3. What has been said goes upon the theory that the state is the only party interested in *habeas corpus* proceedings adversely to the petitioner, when the person alleged to be wrongfully restrained of his liberty is detained upon a criminal charge; but, as indicated in the brief discussion of the first proposition, we can not agree with the learned counsel for defendants in error that the respondent in such a proceeding is not a party thereto. The issuance of a writ of *habeas corpus* is to all intents and purposes the commencement of a civil action, not an action strictly so called, within the meaning of section 2629, Rev. St., 1898, to be commenced by the issue of a formal summons, but in the same sense that proceedings to enforce the remedy by mandamus and proceedings by writ of error are civil suits, as has been repeatedly held. The issuance of the writ is the commencement of a proceeding in a court of justice for the enforcement or protection of a right within the meaning of section 2595, Id. In *Ex parte Tom Tong, supra*, the issuance of the writ of *habeas corpus* was denominated the commencement of a suit to enforce a civil right. That was said in the same sense that this Court declared, in *Paine vs. Chase*, 14 Wis., 653, that the issuance of a writ of error is the commencement of an original suit and regarded as the commencement of an action, and in the same sense that it was said, in *State vs. Jennings*, 56 Wis., 113, 14 N. W., 28, that a proceeding by *mandamus* is essentially a suit. True, the issuance of either of the writs mentioned, as before indicated, is not the commencement of an action strictly so-called within the meaning of the code,

because it is there declared that all remedies in courts of justice are divided into actions and special proceedings (section 2594, Rev. St. 1898) and that a civil action shall be commenced by the service of a summons (Sec. 2629, Id.) But the grant of power to circuit courts to issue writs of *habeas corpus* and *mandamus*, among other common-law writs, contemplated their use for the purposes they were devoted to before the adoption of the code, *i. e.*, for the commencement of suits within the broad meaning of the term; and their essential character in that regard has not been and can not be changed by any legislative enactment. Whether the issuance of such a writ be called by the code the commencement of a civil action or a special proceeding, it is to all intents and purposes the commencement of a suit and the final determination thereof is a final judgment in a suit or proceeding in the nature of a civil action. In *Holmes vs. Jennison*, 14 Pet. 540, 564, 10 L. Ed. 591, Chief Justice Taney said: "If a party is unlawfully imprisoned, the writ of *habeas corpus* is his appropriate legal remedy. It is his suit in court to recover his liberty." The Court further said, in effect, that the term "proceedings in a suit" and the term "proceedings in an action" are synonymous; that when a law confers, in general terms, jurisdiction upon an Appellate Court to review on writ of error the final judgment in any suit, it includes jurisdiction to review the final determination in *habeas corpus* proceedings.

It follows from what has been said that the *habeas corpus* proceedings in question must be regarded as a civil action—an ordinary proceeding in a court of justice to enforce a personal right—within the meaning of section 2595, Rev. St. 1898, which says that such a proceeding is an action. That is in harmony with the decisions of this court to the effect that, without any statutory regulations, a writ of error lies to review a final determination on *habeas corpus* (*State vs. Smith*, 65 Wis., 93, 26 N. W. 258), and with *State vs. Kemp*, 17 Wis. 669, and cases which followed it, denying to the state the use of the writ of error in criminal cases. That rule was one of judicial policy only, in a field where it was supposed the court was free to

establish the law for this state, and has been abrogated by statute (section 3043, Rev. St. 1898). This was the suit of the defendants in error and their only adequate remedy to vindicate their right of personal liberty. The immediate instrument of the wrong complained of was the sheriff of Milwaukee county. The petitioners for the writ sought to establish their right to personal freedom notwithstanding the commitment under which the sheriff justified his conduct. They were, to all intents and purposes, plaintiffs, within the meaning of section 2601, Id., regardless of the name by which such parties are commonly known. The adverse party on the record was the sheriff. He was to all intents and purposes the defendant in the proceedings, regardless of the name by which such a party is commonly known. The statute (section 2595, Id.) says: "An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right," and unless the state is the plaintiff and the proceeding is against the defendant for the punishment of a criminal offense, it is a civil action, and every person necessary to a complete determination of the controversy as against the plaintiff is a necessary party and an interested defendant. Section 2603, Id. The term "party to a suit (or action)" applies as properly to persons seeking, by writ of *habeas corpus*, to vindicate their right to personal freedom, and to the adverse party who is restraininig them of it, as to contestants upon the record in any other suit. The former are persons seeking to establish their legal rights; the latter, persons on whom it is sought to impose an immediate duty or liability to recognize such rights. 15 Enc. Pl. & Prac., p. 463.

Upon the district attorney was imposed the duty of guarding the interest of the state, but he had no duty to perform by virtue of his office for the sheriff as an individual. The latter was a party, and an interested party, because he was charged with being guilty of the particular wrong which it was the purpose of the writ to redress; hence the law must be construed as according to him the same right as to any other party to be heard by counsel. True, as counsel for defendant in error say, section

3436, Rev. St. 1898, protected the sheriff from any liability for obeying the order discharging, or directing a discharge of, the prisoners, but there is no statute protecting him from liability for the wrongful imprisonment.

We are not unmindful that there are decisions to the effect that an adjudication in *habeas corpus* proceedings is not binding in a subsequent suit to vindicate the same right between the parties, or a suit between such parties where same question is material. *In re Quinn*, 2 App. Div. 103, 37 N. Y. Supp. 534; *People vs. Brady*, 56 N. Y. 182; Hurd, Hab. Corp., Sec. 386. That doctrine was based on a supposed common law rule that a decision on *habeas corpus* is not subject to review on appeal or writ of error. Such doctrine has been modified by judicial policy in many jurisdictions and in others displaced by statute, as it has been in this state, so far as it before prevailed here. Church, Hab. Corp. (2d Ed.), p. 577; *Ex parte Cuddy* (C. C.), 40 Fed. 62; *Perry vs. McLendon*, 62 Ga. 598; *Ex parte Jilz*, 64 Mo. 205. Section 3437, Rev. St. 1898, which is the same as the Missouri statute that governed *Ex parte Jilz*, expressly changed the common law rule as regards the effect of a final determination of a *habeas corpus* proceeding. It expressly prohibits the commencement of a second *habeas corpus* proceeding for the same cause, while the determination in the first remains unreversed. That and the remedy for a review of such a final determination by writ of error sued out by either party to the writ, which is given by our statute (section 3043, Id.), effectually changed the common law rule, so that the doctrine of *res adjudicata* has now the same applicability to *habeas corpus* proceedings as to other suits.

We have not overlooked the suggestion that the doctrine that ruled *McCarty vs. Board*, 61 Wis., 1, 20 N. W. 654; *People vs. Lawrence*, 107 N. Y. 607, 15 N. E. 187, and *Bryant vs. Thompson*, 128 N. Y. 427, 28 N. E. 522, and some other cases, applies to the status of a person defending against the charge in *habeas corpus* proceedings of unlawfully restraining another of his liberty. That doctrine is that a person or tribunal, exercising judicial functions between parties, is not a party to a pro-

ceeding to challenge a decision made by him so that he may himself take an appeal or be a party to an appeal involving such decision. In *McCarty vs. Board*, a decision of the board of supervisors had been reversed on writ of certiorari and the board attempted to appeal. In *People vs. Lawrence* a judge whose decision of a matter had been reversed on *certiorari* attempted to appeal. The mere statement of the circumstances under which courts have applied the doctrine referred to is sufficient to show that it has no application here. If the court that heard the *habeas corpus* proceedings or the examining magistrate were here claiming to be a party to the writ of error, and demanding an opportunity to be heard, the cases cited by counsel would be in point. It has been repeatedly held that a person or body not acting in a judicial capacity, but a party to a judicial proceeding as a representative of the public, even though having no pecuniary interest in the litigation, has an appealable interest in a judgment adverse to his or their authority. *State vs. Wolfrom*, 25 Wis., 468; *Moede vs. Stearns Co.*, 43 Minn., 312, 45 N. W. 435; *People vs. Jones*, 110 N. Y. 509, 18 N. E. 432.

What has been said, it seems, covers every suggestion that has been made why the sheriff of Milwaukee county was not entitled to be heard by counsel in the Circuit Court in the *habeas corpus* proceedings and why he is not entitled to be heard in this court as a party to the writ of error. He was and is a party in every sense of the word, and is, so far as concerns himself, entitled to be heard by counsel of his own choosing.

The first question on the merits is, does the warrant of commitment state any offence known to the laws of this state? That involves an inquiry into whether a statement of the facts—necessary to the jurisdiction of the offense, if there be one, and in substance that the person named in the commitment on a particular day named, was brought before the Court charged on oath with committing the offense of conspiring to injure, and that such Court, from the examination had, was satisfied that the offense charged had been committed and that there was reasonable ground to believe such person guilty thereof—shows an adequate cause for holding such person for trial. Defendants in

error claim that it does not, because it fails to show, in detail, the existence of the facts necessary to constitute the offense of conspiring to injure, with some approach at least to the technical accuracy of an indictment at common law, so as to identify the alleged wrongful conduct with either the common-law offense of conspiracy or the offense stated in section 4466a, Rev. St. 1898. Counsel do not state the rule of certainty, by which they contend the commitment should be tested, in the exact language we have used, but it seems from their reasoning that what has been said fairly expresses their contention. They say the warrant was fatally defective because it did not show with whom the person named therein conspired, nor the fact that there was more than one guilty participant so as to make a combination possible; that it failed to state the facts constituting the offense; that it omitted to recite that the alleged combination was entered into for the purpose of wilfully and maliciously injuring another; that it did not literally follow the statute; and that it did not conclude with the words "against the form of the statute in such case made and provided."

We do not understand that any such degree of certainty in a commitment as that contended for is required. Authorities may be found here and there tending to support counsel's contention; for example *Ex parte Branigan*, 19 Cal. 133, cited to our attention, which is contrary to later decisions made by that court and out of harmony with the current of authority, as we shall show. The general rule is that it is sufficient, in a commitment for trial, to state with reasonable clearness the nature of the offense with which the person is charged, and conclusions of fact in general language, justifying his detention on such charge; that a statement of the specific facts in detail, on which the charge is based, is unnecessary. A multitude of authorities to that effect might be cited, commencing with the older books and coming down to date. In *Collins vs. Brackett*, 34 Minn. 339, 25 N. W. 708, the offense charged was one created by statute. The particular section was not referred to, nor were the facts essential to the offense stated in detail; but there was sufficient in the commitment to clearly indicate the kind of

offense for which the accused was held to answer, and sufficient to indicate by reasonable inference the statute creating the offense. The Court said that it satisfied the rule of convenient certainty by which such instruments are to be tested; that it pointed by reasonable inference to the statute creating the offense, and therefore, by reasonable inference, stated everything necessary to the offense which was not specifically set out. "It is not necessary," said the Court, "in such an instrument, to set forth the facts constituting the offense particularly. * * * It is impossible to construe the commitment as referring to any other than the statutory offense. While it does not set forth every ingredient in such offense, it contains specifications enough to indicate the general nature of the crime charged, and that is sufficient." In *State vs. Everett*, Dud. (S. C.) 295, a case often referred to by Courts and text writers, the commitment considered merely described the offense as the crime of larceny, no fact being stated essential to that offense; yet it was held, on *habeas corpus*, that the commitment was sufficiently certain to justify the officer in detaining the prisoner; that it is a great mistake to suppose that such a warrant need enumerate any fact or circumstance accompanying the offense, the nature of which is set forth therein; that it is sufficient to merely state the offense with convenient certainty; that it should not be for felony generally, but that the instrument should indicate the special nature of the felony. That decision is in harmony with the authorities generally, though directly contrary to *Ex parte Branigan, supra*, which supports counsel's views as we have before indicated. All the cases cited, it will be found, declare for the rule of convenient certainty merely. But while the California case regards that degree, as it seems, to call for certainty to a certain intent in particular, it is obvious that convenient certainty is satisfied where language is used which, by reasonable inference, points with reasonable clearness to the particular subject intended to be expressed. The doctrine which we say generally prevails was followed in later California cases. *Ex parte Moan*, 65 Cal. 216, 3 Pac. 644; *Ex parte Walpole*, 85 Cal. 362, 24 Pac. 657. True, reference

is there made to a form for commitment prescribed by statute, which is however substantially identical with one which, it is said in section 4774, Rev. St. 1898, may be used. The California Court, in the early case, while reaching a conclusion directly opposite to that declared in *Collins vs. Brackett*, *supra*, and the cases to which we will presently refer, referred to the same authorities for support, *i. e.*, 1 Chit. Cr. Law, 109, and 2 Hale, P. C. 122. A careful reading of those authorities discloses the fact that what is said about the higher degree of certainty is merely advisory. When it comes to the necessities of the case the lower rule is stated with many illustrations: For example, quoting from 1 Chit. Cr. Law, 111: "It is necessary to set forth the particular species of crime * * * with convenient certainty. * * * If the commitment be for felony it ought not to be generally for felony, but it must contain the special nature of the felon briefly, as for felony of the death of J. S. or for burglary in breaking the house of J. S., etc. But though it was formerly thought otherwise, it appears now to be settled, that a commitment for high treason, or suspicion of treason generally, or for treasonable practices, without stating any overt act or other particulars of the crime is sufficient. And * * * there are precedents of commitment for felony in general in good authors, without stating the specific accusation. So in Wilkes' Case, 2 Wils. 153-159, a commitment for publishing 'a most infamous and seditious libel entitled "The North Britons," Number 45, tending to inflame the minds and alienate the affection of the people from his Majesty, and to excite them to traitorous insurrections against the government,' was held sufficient, though it was urged that the libel ought to have been set forth in order that the Court, on a *habeas corpus*, might be able to fix the quantum of bail. So it has been held that a commitment which charged the party generally with insulting justices of the peace in the execution of their office, without specifying what he said or did, is sufficient. *It is, however, in general advisable to describe the offense concisely but in substance as an indictment.*" There is obviously a wide difference between what is advisable and what is necessary in such cases. It would be a

mistake to adjudicate rights upon the basis of what is merely advisable, losing sight of the necessities of the case. We cite the following additional authorities sustaining the view expressed: *Ex parte Howard*, 26 Vt. 205; *People vs. Johnson*, 110 N. Y. 134, 17 N. E. 684; *Ex parte Willoughby*, 14 Nev. 451; *People vs. Gray*, 67 How. Prac. 456; *State vs. Killet*, 2 Bailey, 289; *In re Kelly* (C. C.), 46 Fed. 653; 4 Enc. Pl. & Prac., pp. 577, 578, and cases cited.

It follows from what has been said that if the general statement in the commitment, in its literal sense or by reasonable inference, points clearly to the offense intended to be charged, and such offense, so called, is one in fact, for which an accused person can properly be held, the commitment was a complete defense to the *habeas corpus* suit till overturned by some defect of a jurisdictional nature in the proceedings upon which it was based, unless it was fatally defective by reason of the statute (section 4774, Rev. St. 1898). As we have seen, the description of an offense well known to the law, by its generic name, as the offense of arson, burglary, larceny or murder by reasonable inference indicates the existence of all the essentials of the offense. That is just as true of a mere statutory offense when it has a name which individualizes it and points with reasonable certainty to the statute on the subject. *In re Kelly*, 46 Fed. Rep., 653; *Collins vs. Brackett*, 34 Minn., 339; and *People vs. Johnson*, 110 N. Y., 131, fully cover that question. Applying that rule to the commitment in question, no difficulty whatever is perceived. It says the accused was charged with having committed on a day named, the offense of conspiring to injure. The use of the term "conspiring" suggests without possibility of doubt that two or more persons were concerned in the offense. The only law in this state making a mere agreement between two persons to do an act injurious to another under any circumstances an offense is section 4466a, Rev. St. 1898. Therefore the language, "the offense of conspiring to injure," with reasonable clearness refers to such statute. It includes by inference, a statement of all the facts necessary to satisfy the calls of the statute. The statement of the name

of the crime states with convenient certainty the nature thereof and of course suggests the existence of facts necessary thereto. The general statement includes the details, if such general statement is sufficient to suggest them with reasonable clearness. A commitment so drawn as to satisfy the degree of certainty thus indicated is sufficiently precise to satisfy every part of it and is according to the prevailing rule on the subject.

The idea advanced by counsel that the commitment is fatally defective for want of the preliminary words, "against the form of the statute in that case made and provided," can hardly be considered as being seriously urged. There was a time when substance in judicial proceedings was in some respects sacrificed to mere form, or when mere form was considered to be as essential as substance; but in the progress of events the law has developed to a point so far away from such notions that they are regarded as obsolete. So long as the commitment shows that the accused was held for trial for a criminal offense, the unavoidable inference is that the act charged took place, if at all, contrary to law. Any mere formal statement of that, as a concluding phrase in the commitment, was wholly unnecessary. This Court, in *Nichols vs. State*, 35 Wis. 308, characterized a useless expression, similar to the one in question, as "a mere rhetorical flourish," adding nothing to the substance of the indictment, and as wholly unnecessary in the absence of a constitutional or statutory mandate making it so. That was affirmed in *Murphy vs. State*, 108 Wis. 111, 83 N. W. 1112. There is no such mandate in the way as to the matter under consideration.

A suggestion is made by one of the learned counsel that the commitment is void because it does not follow strictly the form prescribed by statute, and another says there is no statutory commitment for such a case. The first suggestion will be considered without deciding that the officer in this case was required to use the particular form referred to. Section 4740, Rev. St. 1898, requires a warrant to contain the substance of the complaint on which it is issued, and section 4774, Id., prescribes a form of commitment for trial that "*may be* used," which indicates that the offense should be stated "as in the war-

rant." The rule is that where a form is prescribed by statute is must be strictly followed. That has been held to mean, followed with almost technical accuracy where the language of the statute so indicates. *Keniston vs. Chesley*, 52 N. H. 564. But section 4774 does not so indicate, unless we read "may" as "must" or "shall" and give thereto its full meaning down to immaterial details. Nothing of the kind, we think, was intended. *Streeter vs. Frank*, 3 Pin. 386, did not go that far. It dealt with a material omission from a statutory form. Section 4774 is open to a reasonable construction, requiring only that the form be followed strictly as to the substance of things, not literally. There is a difference between following a form literally and following it strictly. The former goes to minuteness of detail in mere matters of form, while the latter may be satisfied by the essential elements. In *Streeter vs. Frank* one of those elements was omitted. The words in the form under discussion, "state the offense as in the warrant," taken in connection with the requirement that the warrant shall recite the substance of the complaint, mean no more than that it shall state the same offense as the one named in the complaint with sufficient accuracy that its identity will appear with convenient certainty. What has been said on another branch of the case as to such degree need not be repeated. The complaint charged in general language, or attempted to do so, and also by all the particulars, the commission of the offense to injure, going further in such particular than the specific offense, created or declared in section 4466a, though it is plain that such statute was what the complainant had in mind. The substance of the complaint was that the accused were guilty of having committed, on a day named, the offense of conspiring to injure, and that was substantially carried into the commitments.

If we were to hold that the commitments do not show with convenient certainty, within the rules above stated, that the defendants in error were imprisoned to await their trial upon a charge of having violated section 4466a, Rev. St. 1898, the Circuit Court none the less erred in discharging them—if the complaint upon which they were arrested charged an offense

known to the law, and the record of the examination which the Court had properly brought to its attention showed that there was evidence tending to support the charge on these two essentials: First, that the offense was committed; second, that there was probable cause for believing that the accused were guilty thereof—regardless of whether the decision of those questions, or either of them, by the committing magistrate, was right or wrong. That was substantially the rule at common law, and it was preserved by the constitutional grant of power to circuit courts to issue writs of *habeas corpus*, especially since there is no statute in any way restricting the jurisdiction of such courts in that regard. So far as the statutes of this state treat the subject they confirm and broaden the common-law rule. Express provision is made for bringing to the notice of the Court, in a *habeas corpus* suit to vindicate the right of a prisoner, detained for trial upon a criminal charge, to his personal liberty, the record of the examination including the evidence taken, and it is made his duty to examine such evidence, and, if thereby it appear to him that the accused is guilty of the offense, to commit him for trial or admit him to bail regardless of any irregularity in the original commitment. Section 3429, Rev. St. 1898; *State vs. Bloom*, 17 Wis. 521. It is also the duty of the Court on *habeas corpus* to examine the complaint, and discharge the prisoner if it does not state an offense known to the law; and to examine the evidence and treat the decision of the examining magistrate as outside of his jurisdiction if no competent evidence is found upon which such magistrate could properly have acted. That is well settled by the authorities. Church, Hab. Corp., Secs. 231, 236; *In re Wadge*, 21 Blatchf. 300, 16 Fed. 332; *In re Louis Oteiza y Cortes*, 136 U. S. 330, 10 Sup. Ct. 1031, 34 L. Ed. 464; *Nishimura Ekiu vs U. S.*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146; *Ex parte Bollman*, 4 Cranch, 75, 125, 2 L. Ed. 554. Whatever conflict apparently exists on this question in the books will be found on careful examination not to be a conflict in fact, but is explainable by reference to statutory regulations. We have no statutory regulations in conflict therewith, but on the contrary the statutes of

this state substantially declare the common-law rule. True, at common law the writ of *habeas corpus* reached only *jurisdictional* defects; but, as the term is rightly understood, it goes further than counsel for plaintiffs in error seem to concede. Some Courts use the term in the restricted sense of jurisdiction of the person and of the subject-matter, while others, and those it is believed holding the correct doctrine, extend it to include excess of jurisdiction, treating a decision—other than one upon the trial of an issue—that a complaint is sufficient when it does not state any offense known to the law, or one that the essential facts exist warranting the commitment of a person for a trial on a criminal charge, where there is no competent evidence for the judgment of an examining magistrate to reasonably act upon, as on the same basis as any other jurisdictional defect in the proceeding. That was early declared as the common-law doctrine and the one to be followed where there is no statute affecting the subject otherwise. *Ex parte Bollman, supra.* Chief Justice Marshall there said, after recognizing the distinction between imprisonment upon a final judgment and detention under a commitment to stand trial: "It is unimportant whether the commitment be regular in point of form or not; for this Court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the Court below ought to have done." Page 114, 4 Cranch, and page 567, 2 L. Ed. "This having been a mere inquiry, which without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held for trial. * * * 'If,' says a very learned and accurate commentator, 'upon this inquiry it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawul totally to discharge him. Otherwise he must either be committed to prison or give bail.'" Pages 124, 125, 4 Cranch, and page 570, 2 L. Ed. That declaration has always been adhered to by the federal courts and followed generally by all courts where

jurisdiction in *habeas corpus* proceedings, or the practice therein, is not otherwise regulated by statute.

There is no need to go further to demonstrate that the common-law office of the writ of *habeas corpus*, as it came to us and has been preserved by our state constitution, is as indicated by the decision referred to. While it is true that such writ never takes the place of a writ of error, and is confined to jurisdictional defects, when it is resorted to merely for the purpose of liberating a person detained in custody to await his trial on a charge of being guilty of a criminal offense, the questions of whether there was any evidence for the magistrate to act upon and whether the complaint charges any offense known to the law are jurisdictional matters. The reviewing Court, in the exercise of its function, must necessarily pass upon and reverse or affirm the decision of the committing magistrate, if such matters are properly presented for its consideration, according to its determination thereof, and in doing so it does not go beyond jurisdictional defects. It can examine the evidence only sufficiently to discover whether there was any substantial ground for the exercise of judgment by the committing magistrate. It can not go beyond that and weigh the evidence. It can say whether the complaint will admit of a construction charging a criminal offense, or whether the evidence rendered the charge against the prisoner within reasonable probabilities. That is all. When it has discovered that there was competent evidence for the judicial mind of the examining magistrate to act upon in determining the existence of the essential facts, it has reached the limit of its jurisdiction on that point. If the examining magistrate acts without evidence, he exceeds his jurisdiction; but any act, upon evidence worthy of consideration in any aspect, is as well within his jurisdiction when he decides wrong as when he decides right.

Counsel for plaintiff in error cite to our attention a large number of cases to support their contention that the Circuit Court had no jurisdiction to review the evidence, many of which are cases decided by this Court. We have taken time to examine each of such cases and are unable to discover that they

furnish any support for counsel's position. For example, *Ex parte Jones* (C. C.), 96 Fed. 200, one of the significant cases referred to, states the rule in the syllabus, which is fully borne out by the opinion, thus: "The sufficiency of the evidence on which an accused was committed by a magistrate is not open to review in a proceeding by *habeas corpus*, but where, although there was evidence of the commission of the offense, there was no competent evidence even tending to incriminate the person charged, he should be discharged on *habeas corpus*." The concluding language of the opinion is as follows:

"It is true that there was evidence before the commissioner tending to show that the offense charged had been committed by some one, but a careful examination discloses no legal evidence on which the commissioner could exercise his judgment in holding the petitioner for trial. An order will be made discharging the petitioner." The decisions of this Court cited, in the main, refer to the scope of the jurisdiction of a court in reviewing the final judgment of another court upon writ of *certiorari* or *habeas corpus*. Manifestly, they do not touch the question here under discussion. Neither a writ of *certiorari* to review a final judgment of a court upon a trial, nor a writ of *habeas corpus* for that purpose, reaches the evidence. That is undoubtedly true. No common-law rule is better settled than that, while the contrary is just as well settled as regards the functions of a writ of *habeas corpus* in testing the legality of a commitment for trial for a criminal offense.

True, as counsel say, the expression has often been used by this Court that upon *habeas corpus* proceedings only jurisdictional errors can be considered, and that has been used without qualification and in a way to indicate—to a person who has not in mind the distinction between jurisdiction for the trial and determination of a cause, and jurisdiction to hold a judicial inquiry to determine whether a prosecution shall be instituted—that insufficiency of evidence, no matter how great, can not be considered, because, the court having jurisdiction of the subject matter and the person, a decision upon insufficient evidence or without any evidence is judicial or mere error, not jurisdic-

tional error. What the court said in each one of the cases referred to was correctly said as applied to the case. The following are some of the cases: *In re Milburn*, 59 Wis. 34, 17 N. W. 965; *Wright vs. Wright*, 74 Wis. 439, 43 N. W. 145; *In re Graham*, 76 Wis. 366, 44 N. W. 1105; *In re Rosenberg*, 90 Wis. 581, 63 N. W. 1065, 64 N. W. 299; *In re Meggett*, 105 Wis. 291, 81 N. W. 419; *In re Pikulik*, 81 Wis. 158, 51 N. W. 261; *In re French*, 81 Wis. 597, 51 N. W. 960; *In re Eckart*, 85 Wis. 681, 56 N. W. 375. They all follow the well-known rule that where there is jurisdiction to try and determine an issue, there is jurisdiction to commit error to the extent of deciding the ultimate fact involved without competent evidence tending to support it, and that the error can only be corrected upon writ of error or appeal where one is allowed; that the writ of *habeas corpus* or writ of *certiorari* can not reach the mischief. But a proceeding before an examining magistrate is not a judicial trial. It is a mere judicial inquiry, as before indicated, for the purpose of determining whether an offense has been committed and there is a probability that the accused is guilty thereof and should be placed on trial therefor. No plea or issue is necessary. No jury is demandable or proper. The doctrine of *res adjudicata* does not apply so that the result of one inquiry will preclude another. It is a proceeding that was unknown to the common law,—a mere statutory creation, a personal privilege which the accused must be accorded unless he waives it. Being statutory and special, evidence tending to establish the facts justifying a commitment or holding to bail for trial, is jurisdictional the same as any other statutory essential. The statute awarding the privilege provides that the examining magistrate shall act, in determining the facts, upon evidence; and that contemplates that there must be evidence, and competent evidence, tending to establish the facts. It is jurisdictional in the same sense that the production of some competent evidence before a quasi judicial body, authorized by statute to act only upon evidence, is jurisdictional. The rule in such cases is that a clear violation of law in doing those things that are within the scope of the power of the officer or body to do is jurisdictional error.

State vs. Whitford, 54 Wis. 150, 11 N. W. 424; *State vs. Dodge Co.*, 56 Wis. 79, 13 N. W. 680; *State vs. Lawler*, 103 Wis. 460, 79 N. W. 777. For further authorities to support the views here expressed, see Church, Hab. Corp., §§ 237-247; *People vs. Martin*, 1 Parker, Cr. R. 187; *In re Snell*, 31 Minn. 110, 16 N. W. 692; *In re Hardigan*, 57 Vt. 100; *In re Simon* (Sup.) 13 N. Y. Supp. 399; *State vs. Hayden*, 35 Minn. 283, 28 N. W. 659; *People vs. New York Catholic Protectory*, 106 N. Y. 604, 13 N. E. 435; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *Ex parte Willoughby*, 14 Nev. 451; *Jones vs. Darnall*, 103 Ind. 569, 2 N. E. 229.

Some writers who have favored the profession with text books in recent years, speak of this doctrine as a departure from the common law, through a failure to distinguish between a judicial determination according to the course of the common law and a mere statutory proceeding which, though judicial, is not final in any sense, and is not an action, but a proceeding preliminary to an action. The misconception referred to is very marked in the work of an able writer who cites *State vs. Noyes*, 87 Wis. 340, 58 N. W. 386, 27 L. R. A. 776, to support a suggestion that this court has not departed from the general rule as to the review of judgments on *habeas corpus* in the treatment of the scope of the writ as regards reaching behind the determination of an examining magistrate. That case did not deal with anything but the general rule, that only jurisdictional defects can be reviewed on *habeas corpus*, and the one that a *de facto* judicial officer or body has the same jurisdiction as any other as regards collateral attack. The case is in harmony with the idea that some evidence is necessary to preclude successful collateral attack upon an examining magistrate's conclusion because that is a statutory requisite thereto.

Independently of the common law rule it has been repeatedly held, in states having statutes similar to ours, that they contemplate the examination of the proceedings before the committing magistrate, where properly brought to the attention of the court on *habeas corpus* proceedings, so far as necessary to determine whether the magistrate acted upon competent evi-

dence tending to establish the facts and also the introduction of new evidence on issue joined as provided. *People vs. New York Catholic Protectory, supra; People vs. Richardson*, 18 How. Prac. 92; *In re Henry*, 13 Misc. Rep. 734, 35 N. Y. Supp. 210; *People vs. Tompkins*, 1 Parker, Cr. R. 224. In the report of *People vs. Martin, supra*, there is a full review of American and English authorities, and as a result it is said, reading from the syllabus: "In criminal cases where an indictment has been found the court, upon *habeas corpus*, can not go behind the indictment because there are no means of ascertaining upon what it was found. But on a commitment before indictment the whole question of guilt or innocence is open for examination on the return to the writ of *habeas corpus*, and the inquiry is not necessarily confined to an examination of the original depositions. In such cases, under our Revised Statutes, the proceedings on *habeas corpus* are in the nature of an appeal from the decision of the committing magistrate." It is not to be understood by that language that the court held that, on such appeal, so called, the court could go further in reviewing the decision of the committing magistrate on the evidence on which he acted than to determine whether it furnished some reasonable ground for a decision. Church, in his work on *Habeas Corpus*, expresses the view that such statutes as those in New York and in this state are mere declarations of the common law. He is borne out by the holdings of the New York court, but we need not discuss that subject here. It is quite clear, though, that chapter 147, Rev. St. 1898, was intended to cover the entire field of practice in *habeas corpus* suits so far as relates to original proceedings. The scope of section 3425, *Id.*, is broad enough, if a statute was required on that question, to enable the petitioner for writ of *habeas corpus*, by his petition, to bring to the attention of the Court all the proceedings before the committing magistrate or by presenting the same as evidence in support of his answer to the return, where such answer contains allegations rendering such proof competent. Sections 3427, *Id.*, precludes examination into the proceedings upon which the determination of the court was had in committing

the person, only when such detention is upon a final judgment or order. That manifestly does not include a determination of a mere judicial inquiry. Section 3429, *Id.*, refers to the former section and contemplates the examination of evidence produced before the examining magistrate where it is properly brought to the attention of the Court.

Sufficient has been said to demonstrate that counsel for plaintiff in error have confused the scope of a *habeas corpus* suit calling in question the validity of a final judgment or order and the scope thereof as to reaching the proceedings of a committing magistrate. It is not understood, it seems, that failure to comply with the statute requiring such magistrate, in his inquiry, to act upon evidence, is not an error committed in acting within his jurisdiction, as is the act of entering a judgment, by a court, upon the trial of an issue, without competent evidence to warrant it,—but is error in going beyond his jurisdiction. The general rule invoked by counsel is as claimed, but the application of it contended for is wrong.

The point made by counsel for plaintiff in error that the Circuit Court erred in going beyond the warrant of commitment and examining the complaint, and that it would have been error to have taken into consideration the evidence given before the committing magistrate, which was properly produced as part of the *habeas corpus* proceedings, can not be sustained. The position of counsel for defendants in error, that the question of whether the complaint states any crime known to the law, and that of whether there was any evidence tending to show the facts essential to the detention of the accused for trial upon the charge, were open, is approved.

The doctrine is invoked by the learned counsel for defendant in error Melvin A. Hoyt, that "Where concert of action is necessary to the offense, conspiracy does not lie." That principle is familiar, but its application, as its language clearly indicates, is necessarily confined within very narrow limits. It does not reach a situation where mere combination to effect an object is itself criminal and not merged in a crime of higher degree, else the absurd result would follow that the offense of

conspiracy would be impossible either at common law or under the statute. The rule applies where the immediate effect of the consummation of the act in view, which is the gist of the offense, reaches only the participants therein, and is in such close connection with a major wrong as to be inseparable from it, as for instance, in the offense of adultery, or bigamy, or incest, or dueling. That illustration, in a different way, is given at section 1339, Whart. Cr. Law, which is cited to our attention and relied upon by counsel, but which, as it seems, is wholly misunderstood in urging it upon the attention of the Court as applicable to the facts of this case. Where an act is of itself an offense, as that of adultery, it can not be made a different offense because of the circumstance that in the conception of it a precedent agreement by two persons is necessary; but if the act is preceded by an agreement between several persons to cause the offense to be committed by others, or between a member of the combination and a person outside of it, the gist of the precedent concurrence is the wrongful agreement; that of the object thereof is the adulterous act. In the latter there is the element of *concursus necessarius*—the concurrence in the ultimate act constituting the crime, precluding its being prosecuted as the crime of conspiracy. In the former there is also the element of *concursus necessarius* in that at least two persons are necessary to a combination or agreement. But there is also the element of *concursus facultativus*, making it a distinct offense. Those concerting to cause the crime to be committed may be prosecuted for the offense of conspiracy, and those guilty of the act the combination was formed to bring about may be prosecuted for that, though the effect thereof be to prosecute one of the parties for both offenses. In the latter the plurality of agents, really, as Mr. Wharton says, in effect, is in aid of the conception to commit the ultimate act of adultery. In the former the plurality of agents is as necessary to the full conception of the offense so as to preclude the possibility of failure thereof, as to the consummation of the offense itself. In the one, concert is essential to the act and a necessary part of it; in the other, concert, itself an offense, is a mere aid to the act which

is the ultimate purpose thereof—a purpose that is susceptible of being abetted without, though not as effectually as with, the specific, independent act of combination. It is only where the concurrence to commit an offense and the consummated act are so connected that they really constitute one act, every element inculpatory of each party, so that separation of the whole into its constituent elements and a prosecution for each as a distinct offense would place the parties twice in jeopardy, that the rule applies.

Shannon vs. Com., 14 Pa. St. 226, and *Miles vs. State*, 58 Ala. 390, cited by counsel to sustain his view, are in harmony with what has been said. In the first case cited the rule is stated thus: "Where concert is part of a criminal act, it is not a subject of indictment as a conspiracy to commit the act." That is, as applied to this case, if the mere infliction of an injury to the Journal Company in its business was a criminal act, and obviously it was not such, the infliction thereof by two persons acting in concert and by mental concurrence could not be prosecuted as a conspiracy. But, as said in *Shannon vs. Com.*, where an act is an integral offense and not an integrant part of one, a guilty participant may be prosecuted for both. The term "act" as there used manifestly refers to an act which is illegal in the sense that it is wrong, tested by the rules of good morals. In this case the sole offense, if any is charged, is the combination of several persons willfully and maliciously to injure the Journal Company in its business. There is no room whatever for saying that the prosecution for that offense would result in the separation of it from another and greater offense, as in the case where persons guilty of the crime of adultery were attempted to be prosecuted for a conspiracy to commit that offense. The fact that it would not be practicable or even possible in such a situation for one person alone to commit the act, *i. e.*, of injuring the business of the Journal Company, which is the alleged object of the combination, does not militate against the prosecution of all the parties to the combination as guilty of the crime of conspiring to willfully and maliciously injure the Journal Company in its business. Counsel admits that there

is a dearth of authority to support the application contended for, of the principle under discussion. He failed to cite to the attention of this court any that meet the situation when fairly analyzed, while the explanation of the rule we have given, showing that it has no application to the prosecution under discussion, is supported by ample authority, as it is by reason and common sense. We cite the following: *U. S. vs. Stevens*, (D. C.) 44 Fed. 132; *U. S. vs. Boyden*, 1 Low. 266, Fed. Cas. No. 14,632; *Reg. vs. Boulton*, 12 Cox, Cr. Cas. 87; *U. S. vs. Rindskopf*, 6 Biss. 259, Fed. Cas. No. 16,165; *U. S. vs. Bayer*, 4 Dill. 407, Fed. Cas. No. 14,547; *State vs. Sprague*, 4 R. I. 257; *Ochs vs. People*, 124 Ill. 399, 426, 16 N. E. 662; *Reg. vs. Whitchurch*, 24 L. R. Q. B. 420; *U. S. vs. Martin*, 4 Cliff. 156, Fed. Cas. No. 15,728; *Reg. vs. Rowlands*, 5 Cox, Cr. Cas. 466. In *Reg. vs. Whitchurch*, a woman conspired with others to administer drugs to herself or by some other means to cause her to abort a child with which she was pregnant, and it was held that all parties concerned in the combination could be prosecuted for the offense of conspiracy. Lord Coleridge, C. J., in delivering the opinion of the court, said: "I cannot entertain the slightest doubt that if three persons combine to commit a felony they are all guilty of conspiracy, although the person on whom the offense was intended to be committed could not, if she stood alone, be guilty of the offense." In *U. S. vs. Bayer* the facts were these: Under the statutes of the United States on the subject of bankruptcy there was an offense that could be committed only by the bankrupt. Such person and others colluded together to facilitate the commission of the offense by him. All were prosecuted for the offense of conspiracy and the prosecution was sustained. Dillon, J., in delivering the opinion of the court, said, in the main, "Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it." In that situation the conspiracy and the consummated act are different offenses, in the sense at least that the fact that the offense has been com-

mitted is no legal bar to a prosecution for the conspiracy. In *Ochs vs. People, supra*, it was said that it is not essential to a conspiracy that the object thereof be possible. We will not further discuss this question. It is not improbable that more has been already said than is warranted in its proper solution. We confess that when it was first suggested on the oral argument it hardly seemed to be worthy of serious attention or that the learned counsel so supposed. But an examination of the full discussion of the subject in counsel's brief satisfies us we were at least in error as to the state of his mind, and we have treated it accordingly and put all the labor upon it which the gravity thereof would call for if there were a reasonable doubt, before a study of the subject, as to whether the case might turn upon its solution.

We have now considered, we believe, all the important contentions and suggestions advanced by counsel for the respective parties, which from any point of view could stand in the way of an examination of the complaint and the evidence, assuming, without intending to decide, as yet, that section 4466a, Rev. St. 1898, is a valid provision of law. It has been seen that the commitment, on its face, justified the sheriff in holding the defendants in error to await their trial for a violation of such section, and that it was competent for the Circuit Court, in the *habeas corpus* suit, the proceedings before the examining magistrate having been duly presented for consideration, to go behind the commitment and determine whether the complaint, by any reasonable construction, stated an offense within the meaning of such statute, and whether there was any evidence tending to establish the two essentials for holding the accused for trial, *i. e.*, that the offense charged had been committed and that there was probable cause to believe the accused guilty thereof. Sufficient has also been said to show that the general language of the complaint, standing alone, to the effect that the accused did, on a day and at a place named—which satisfied the requisites of the statute to that extent—concert together with intent maliciously to injure the Journal Company and the other persons named, in their trade and business, sufficiently charged

the doing of those acts made an offense by the statute. That such general language substantially follows section 4466a, and that such section is the only statute making a conspiracy without an overt act a criminal offense, is not questioned. It follows that the complaint must be construed with reference to such statute, and be held to satisfy it unless the general language thereof is connected with allegations which take therefrom some essential element.

At this point we meet the claim of counsel for defendants in error that the statement of the particulars of the alleged wrongful agreement, and of the acts done pursuant thereto, explains the meaning of the general charge and in that way renders the complaint insufficient. To that, answer is made by counsel for plaintiff in error that the allegations as to acts done pursuant to the conspiracy were unnecessary, the offense being complete as soon as the agreement was made to commit the malicious injury, therefore that such allegations should be rejected as surplusage. That is undoubtedly a correct rule, but no reason is perceived why the statement of the particulars of the agreement can be rejected. It is plain that, while the complaint states generally an agreement to maliciously injure the persons named in their trade and business, in the terms of the statute, and then states that the members of the unlawful combination, pursuant to their unlawful purpose, agreed to do certain specific acts mentioned, the real purpose of the complainant was to state but one offense—not an unlawful conspiracy to injure, generally, the persons named in their business and also an unlawful conspiracy to injure them in such business in a particular way. The facts were stated first according to their legal effect and second in detail. That is the only reasonable construction of the complaint. It should be read as if the language were to the effect that the accused maliciously conspired together to maliciously injure the persons named in their business, in that they agreed and concerted together, in manner and form as stated in the statute, to maliciously injure such persons by doing the particular things alleged. That was the conclusion reached by the circuit judge. He disposed of the case at that point on supposed

insufficiency of the complaint. If he had gone further and examined the evidence the result would not have been different; for that only tended to establish the truth of the complaint. Viewed in the light of the particular allegations as to the nature of the combination, the evidence, for that purpose, was ample to give the examining magistrate jurisdiction to pass upon the truth of such allegations to the extent necessary to hold the accused to trial.

At this time it seems necessary to restate the charge contained in the complaint as we have construed it. Upon that, turn the remaining questions to be considered.

According to the complaint it was in substance agreed between the defendants in error Melvin A. Hoyt, representing the Daily News, Albert Huegin, representing the Milwaukee Sentinel, and Andrew J. Aikens, representing the Evening Wisconsin—each controlling the columns of the paper with which he was connected, each paper being a daily newspaper published in the city of Milwaukee and a medium for advertising business in the same field occupied by the Journal Company, the publisher of a newspaper called the Milwaukee Journal, also a medium for advertising business—that whereas the latter had raised its rates twenty-five per cent above those customarily charged for such service by it and the proprietors of the other papers named, if any person agreed to pay or paid the Journal Company its increased rates for advertising in its paper, he should not have the privilege of advertising in any of the other newspapers unless he should advertise in all of them at such increased rates; but that any person who should decline to pay the Journal Company said increased rates for advertising in its paper, should have the privilege of advertising in any or all of the other papers at the old rate. Now it is said there is nothing in that from which a reasonable inference of the malicious purpose called for by the statute can arise; that such intent means bad intent to injure another in the sense of committing an actionable injury, while the terms of the agreement indicate only a purpose on the part of those concerned in it to promote their own interests regardless of those of their competitor. The

malice of the statute is evidently malice in law, not necessarily ill will or malice in fact. It means, as is commonly said, a *wrongful* act done intentionally without just cause or excuse. The statute does not deal with things corporeal, as the person or property of another, but with his reputation, trade, business or profession. If we can see in the agreement by reasonable inference, the independent purpose to *harm* the Journal Company in its business of furnishing to the trade facilities for advertising, that is sufficient as regards the element of malice. There seems to be no difficulty about that. The principle that every one is presumed to intend the natural and probable consequences of his voluntary acts suggests at once, upon looking at the agreement, that the primary, if not sole, end in view was to force the Journal Company to reduce its advertising rates to the old standard or cause it to lose custom, either of which alternatives would result in pecuniary loss to it and one of them in the destruction of the freedom of action every one is entitled to enjoy in the conduct of his business, without turning any pecuniary or other legitimate gain to its competitors. If the agreement contemplated that any legitimate benefit, under any circumstances, would flow to the participants therein or the concerns they represented, by compelling the Journal Company to reduce its rates for advertising, the ground for it is not disclosed by the transaction as stated, and it is one of those mysteries of a special calling that persons outside thereof cannot comprehend. How could any material benefit have been expected by any member of the combine, from causing a customer or customers of the Journal Company to leave it rather than be denied the use of any other efficient newspaper medium for advertising in the field occupied by the four competitors? No one has seemed to seriously attempt to answer that for defendants in error. Any benefit that could be suggested would be so remote and trifling as not to appeal to our reason as the purpose of forming such an elaborate and far-reaching scheme. In only one view that we can even imagine can it be said that substantial contemplated benefits to the members of the combine could have been expected, and that is this: Assuming that the rea-

sonable necessities of business required at least two newspaper mediums for advertising in the particular field in question, the advantages of the Journal Company's paper were so great that rather than forego the use thereof, it was supposed that advertisers, in considerable numbers, would pay the severe penalty prescribed by the agreement. But that, so far as anything goes which appears in the complaint or the evidence, has little or nothing to rest upon. So, instead of looking into the agreement in vain for anything reasonably suggesting an intent to harm the Journal Company in its business, we have great difficulty in discovering any other intent, and are not able to solve that difficulty without resorting to conjecture.

It follows that we reach the conclusion that the complaint admits of a construction which will satisfy the statute, and also that there was some proof that the defendants in error made the agreement to maliciously injure the Journal Company in its business as charged. We are next to consider whether it was such an injury as satisfies the calls of the statute. Counsel for defendants in error say it was not; that it was only an ordinary agreement between independent persons in their own business, to maintain prices at a particular level for the promotion of their legitimate interests; that such a combination is not illegal in the sense of being actionable at common law; that the statute does not change that, or, if it does, that it is unconstitutional.

We have already proceeded beyond some elements of the above somewhat compound proposition, but those parts to which we have already adverted were so exhaustively gone over by the able counsel who argued the case, both in the main argument and on the re-argument thereafter accorded for that special purpose, that we will give some further attention in this connection to what has already been referred to incidentally.

Assuming, for the moment, that the agreement is of the nature contended for, as indicated, and that the statute is aimed at such, it does not follow, in our judgment, that entering into it was not a criminal offense. That one person acting by himself or many in combination, may, in the legitimate pursuit of their own business, injure the business of a rival even to the extent of

impoverishing him and driving him out of the field of industry occupied in common, leaving him remediless for his misfortune in the absence of a statute to the contrary, must be admitted. National and state legislatures have dealt with that subject in many instances, in recent years, and uniformly with success so far as regards constitutional limitations—with such success in fact that the man of learning must be recognized as one of courage who will attempt at this late day to challenge legislative power in that regard on constitutional grounds. The time seems past for that as regards combinations of individual independent interests, designed to remain independent for most purposes, but to act in combination to control trade. By numerous decisions of the highest courts in this country, the police power incident to sovereignty has been held to be broad enough to permit the legislature to deal, by creating civil or criminal liability, or both, with all combinations in restraint of trade which are void by common law rules on grounds of public policy, and, within reasonable limits to be set by courts in the light of constitutional safeguards, to say that things are contrary to public policy not so before, to legislate against them and to enforce the legislative will by civil or criminal liability, or both:—within the broad field indicated, to regulate or prohibit any combination of the kind we are talking about, formed for the purpose of restraining trade or disturbing those natural business conditions, where every individual is supposed to be free to contend with every other in the regular course of business. We are speaking here of independent interests concerting together for the purpose mentioned. That must be kept in mind. These questions have been so firmly settled that no court will now venture to do more than to follow what has been decided. Contracts that operate merely in restraint of trade, such as it is contended the one in question was, even though unreasonable, were not actionable at all at the common law. They were void, merely. The courts would not enforce or give effect to them. But new conditions have arisen creating new dangers, or intensifying old ones that were once considered so trifling as to pass unnoticed, calling for new restraints and new remedies.

Who can say that sovereign power has been so surrendered as to be left incapable of dealing with that subject. Right or wrong, those dangers have been considered so great, and power to deal with them so ample, that legislation has gone to the length we have indicated, making combinations to stifle independent, individual competition, illegal and actionable, civilly and criminally, all upon the broad ground that legislative authority exists in the administration of the police power, to regulate or prohibit those things which are contrary to public policy by the rules of the common law; and to go further and determine, in the light of new conditions, what is detrimental to the public welfare, and to legislate accordingly.

On what has been said, the following of many authorities that might be cited are in point: *U. S. vs. Addyston Pipe & Steel Co.*, 29 C. C. A. 141, 85 Fed. 271, 46 L. R. A. 122; *U. S. vs. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *Gibbs vs. McNeeley* (C. C.), 102 Fed. 594; *Nester vs. Brewing Co.*, 161 Pa. 473, 29 Atl. 102, 24 L. R. A. 247; *People vs. Sheldon*, 139 N. Y. 251, 34 N. E. 785, 23 L. R. A. 221; *Jackson vs. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *People vs. Nussbaum* (Sup.), 66 N. Y. Supp. 129; *Leonard vs. Poole*, 114 N. Y. 371, 21 N. E. 707, 4 L. R. A. 728; *People vs. Milk Exchange*, 145 N. Y. 267, 39 N. E. 1062, 27 L. R. A. 437; *Ford vs. Association*, 155 Ill. 166, 39 N. E. 651, 27 L. R. A. 298. The number of cases that could be cited on this subject is so great that no attempt has been made to do more than collect here a few that contain pretty full discussions thereof. A study of them reveals the fact that the power of public opinion in favor of preventing combinations to stifle individual freedom in business and the sacrifice of those benefits that are popularly supposed to flow from free competition, has led to legislation in most of the states of the Union, as well as by the federal congress, and that in but very few instances has such an enactment met the bar of the constitution of state or nation. A late work that treats of police powers, sums up the subject here under discussion thus: "It is believed that the constitutionality of none of the numerous anti-trust statutes has been successfully ques-

tioned on the ground that they infringed the personal liberty of contract, in punishing civilly or criminally the entrance into a contract or combination in unreasonable restraint of trade. That such contracts and agreements are void, independently of statute and at the common law—so far, at least, as to justify the courts in refusing to enforce them or in any other way to give the parties to them the aid of judicial process in protecting and enforcing the rights of parties, which grow out of such agreements—has been too long the settled rule of law to admit of any serious question now. And the power of the state to declare such contracts unlawful being conceded, it is completely within the discretion of the legislature to determine whether such unlawful contracts and combinations shall be simply ignored by the courts or the parties to them be subjected to criminal or civil liabilities." 1 Tied. State & Federal Control, Sec. 112.

Coming back to the question of whether the malicious injury which the complaint charges against the defendants in error is such an injury as the one named in the statute, it seems that it makes little difference whether we view the statute as merely declaratory of the common law or as in the line of the numerous state statutes to which we have referred, condemning combinations in restraint of, or injurious to, trade. It has the distinctive element of malice which satisfies common-law requirements of a malicious combination to injure, which is actionable for civil damages and punishable as a criminal offense by common-law rules, as we shall see later. Much confusion is created in cases of this kind by using expressions of courts made on one state of facts or as regards one form of action, to support a conclusion in a case involving a different principle. A large number of cases are cited to our attention where it is said that, if an act committed by one is not actionable, it is not where committed by many acting in concert. The fallacy of that, as applied to conspiracy in its criminal aspect where there is the distinct and substantive wrong of intent to injure, was sufficiently treated by this court in *Martens vs. Reilly* (decided Jan. 8, 1901), 109 Wis. 464, 84 N. W. 840. Counsel for defendants in error, however, insist upon that doctrine in this case, citing many civil cases

where it has some application, damages being the gist of the action, among which are three late English cases that deserve careful consideration. If the doctrine of those cases as settled in the last of them, is to prevail, we must all revise our notions of the law of conspiracy, and the books must be re-written. The following are the cases referred to: *Mogul S. S. Co. vs. McGregor*, 23 Q. B. Div. 598, decided in House of Lords and reported in (1892) App. Cas. 25; and *Huttley vs. Simmons* (1898), 1 Q. B. Div. 181. The first case involved a combination to monopolize trade at the expense of plaintiff, but no element of malice was found. The action was to recover damages. In that situation it was true that the defendants were not liable in combination if one of them would not have been had he acted alone. The interesting feature of that case is absence of malice. When first decided all the learned judges who wrote upon the question reached the conclusion on which the judgment of the court was entered, upon the theory that no specific intent on the part of the defendants to injure the plaintiff wrongfully, no malice, was disclosed by the testimony. Bowen, L. J., said: "Certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several." "A combination may make oppressive or dangerous that which, if it proceeded only from a single person, would be otherwise, and the very fact of the combination may show that the object is simply to do harm, and not to exercise one's own just rights." Fay, L. J., said: "I lay out of consideration in this case competition used as a mere engine of malice, even where I do not in terms repeat the exception." Lord Hannen said: "I know of no restriction imposed by law on competition by one trader with another, with the sole object of benefiting himself. I consider that a different case would have arisen if the evidence had shown that the object of the defendants was a malicious one, namely, to injure plaintiffs, whether they, the defendants, should be benefited or not." The Mogul S. S. Co. Case, as appears from the opinions rendered in both courts, is full of expressions showing that it was not supposed then that an act, not actionable if perpetrated by one, could not be made so when perpetrated by several in combi-

nation, or that liberty to form business combinations to promote the business of the members thereof in the free course of trade, applied to combinations of traders in the same calling to maliciously injure a rival. The free course of trade that one, or a number in combination, may legitimately enjoy, does not include the right to maliciously injure another in his free course of trade. Such is the decision in the Mogul S. S. Co.'s Case on its face. We should say that must have been the view of the learned men who pronounced the opinions in that case, if it were not for what followed in the subsequent case, because it is in harmony with many decisions cited and approved in the opinions, a good instance being *Gregory vs. Brunswick*, 6 Man. & G. 205, where it was held that preconcerted hissing of an actor for the purpose of injuring him in his profession, was actionable. That and many other cases decided on the same principle were approved. If we say that such principle had prevailed in the English courts for two centuries prior to the Mogul S. S. Co. Case, we are supported by the lord chancellor in *Allen vs. Flood*, (1898) App. Cas. 1. There the element of conspiracy was absent, but the element of malice was present. The majority of the court there, contrary to what was said, inferentially at least, and what all of the judges were so careful to say as to indicate that it was the turning point in their minds, in the Mogul S. S. Co. Case, decided that malice in and of itself could not render that a ground for civil liability which without it would be lawful. The reasoning to support that and the decision, at least as applied to a conspiracy with malice, is out of harmony with right and justice, and out of harmony with a multitude of cases that had been theretofore decided by English courts, and the teachings of those who had built and filled the storehouses of learning from which all draw, outside of legal opinions. How can it be harmonized with *Gregory vs. Brunswick*, where the conspirators were held liable because of their malicious purpose; and *Clifford vs. Brandon*, 2 Camp, 358, a similar case; or *Garret vs. Taylor*, Cro. Jac. 567, where malicious impeding of workmen was held actionable,—the authority of which, up to *Allen vs. Flood*, had never been questioned. Those simple cases

contain all the principles which govern this case, on the particular question under discussion.

The decision in *Allen vs. Flood* was not reached by any great weight in number. Lord Watson, who delivered the main opinion in favor of it, confessed that the rule established was new in English law. The lord chancellor labored with great vigor to stem the tide of what he considered would amount to a judicial destruction of a system of law, on an important subject, which was as old as the common law. He said that the decision overruled the views of the most distinguished judges of England who had spoken on the subject for 200 years; that it was a departure from the principle that had theretofore guided the courts in the preservation of individual liberty. He cited numerous expressions of the character of those which we have quoted from the opinions of the judges in the Mogul S. S. Co.'s Case, and said that, "If the elements, which each noble lord in turn pointed out did not exist in that case, had in fact existed, the decision would have been the other way." Lord Morris said that the decision overturned "the overwhelming judicial opinion of England." In that situation one can discover very little in the case to warrant adopting it and extending the principle thereof to a combination to maliciously injure.

After *Allen vs. Flood*, it was but a step to reach *Huttley vs. Simmons, supra*. The conclusion there was in harmony with what Lord Halsbury evidently anticipated would be the final outcome of the rule he so vigorously dissented from. The court held, combining the doctrine of the Mogul S. S. Co. Case and that of *Allen vs. Flood*, that a conspiracy with malice, to do an act, gives a right of action only when the act agreed upon to be done and in fact done, would have been, without pre-concert, actionable as a civil injury; because an act lawful without malice is not made unlawful by the addition of the element of malice.

While it is true that the doctrine of the cases referred to, even up to the final conclusion in *Huttley vs. Simmons*, has to some extent influenced the judicial policy of this country, it is safe to say that the teachings thereof have not, up to this time,

been adopted here in any material degree. In courts where it has been partially adopted there have often been most vigorous dissents, as, for example, *Passaic Print Works vs. Ely & Walker Dry Goods Co.*, 44 C. C. A. 426, 105 Fed. 163. Mr. Eddy, in his work on Combinations, published the present year, after a very careful review of all of those cases, said, speaking of *Huttley vs. Simmons:* "If this decision be sound, there is little indeed to the law of civil conspiracy. The conclusion reached is logically correct if the premises be admitted. If the proposition is sound that a conspiracy to do certain acts gives a right of action only where the acts agreed to be done, and in fact done, would have involved a civil injury to the plaintiff regardless of any confederation, then the combination is entirely immaterial, and the entire law of civil conspiracy is a superfluous discussion. * * * But, notwithstanding the decision in *Huttley vs. Simmons*, we believe the law for England, and certainly for the United States, to be well settled to the effect that parties to a conspiracy may be liable for damages occasioned by acts which, if done by individuals severally, would not give rise to a cause of action." Section 503. In order to well understand that characterization, one must know that, after a review of numerous cases, the author deduced the conslucion that the element of malice, the intent to injure on the part of several acting in combination, will make that actionable that would not otherwise be so.

This Court has often held that an executed conspiracy to inflict a malicious injury is actionable. To hold otherwise now and follow *Huttley vs. Simmons*, would be to overrule those cases. *Bratt vs. Swift*, 99 Wis. 579, 75 N. W. 411; *Association vs. Niezerowski*, 95 Wis. 129, 70 N. W. 166, 37 L. R. A. 127; *Gatzow vs. Buening*, 106 Wis. 1, 81 N. W. 1003. The great weight of authority, almost all authority, is to the same effect. We give a few citations: 1 Hawk, P. C. 446, § 2; *State vs. Stewart*, 59 Vt. 273, 9 Atl. 559; *Carew vs. Rutherford*, 106 Mass. 14; *Ertz vs. Exchange Co.* (Minn.), 81 N. W. 737; *State vs. Buchanan*, 5 Har. & J. 317; *Com. vs. Waterman*, 122 Mass. 57; *Farmers' Loan & Trust Co. vs. Northern Pac. R. Co.* (C. C.), 60 Fed. 803; *State vs. Norton*, 23 N. J. Law, 33; *State vs. Glidden*,

55 Conn. 46, 8 Atl. 890; *Sherry vs. Perkins*, 147 Mass. 212, 17 N. E. 307; *Smith vs. People*, 25 Ill. 17; *In re Crump*, 84 Va. 927, 6 S. E. 620; *Doremus vs. Hennessy*, 176 Ill. 608, 52 N. E. 924.

In the last case above cited, Phillips, J., speaking for the court, summed up the subject under discussion thus: "Lawful competition that may injure the business of another, even though successfully directed to driving that other out of business, is not actionable. Nor would competition of one set of men against another set, carried on for the purpose of gain, even to the extent of intending to drive from business that other set and actually accomplishing that result, be actionable unless there was actual malice. 'Malice,' as here used, does not merely mean an intent to harm, but means an intent to do a wrongful harm and injury. An intent to do a wrongful harm and injury is unlawful, and if a wrongful act is done to the detriment of the right of another, it is malicious; and an act maliciously done, with the intent and purpose of injuring another, is not lawful competition." That expresses the common-law doctrine and the one that prevails here. How contrary it is to *Huttley vs. Simmons*, appears without a suggestion.

The late English doctrine seems not to be one of those changes which come from mere development; it is a revolution. The pressure of desire for freedom to combine to monopolize trade and render combinations successful by the malicious destruction of the business of competitors is not liable to find favor with the courts in this country, especially at a time when public opinion to the contrary is so strong that much of the time of legislatures is occupied in inventing new methods of preventing combinations which are perfectly lawful by rules of the common law. The ideas pressed upon the attention of the court in this case have been pressed upon every court in the land where opportunity therefor has been presented since the decision in the Mogul S. S. Co. Case. So far as then developed they were presented in *Farmers' Loan & Trust Co. vs. Northern Pac. R. Co.*, *supra*, and rejected, the learned circuit judge who wrote the opinion quoting with approval from *Com. vs. Carlisle, Brightly, N. P.*, 36, the following: "It will therefore be perceived that the

motive for combining, or, what is the same thing, the nature of the object to be attained as a consequence of the lawful act, is, in this class of cases, the discriminating circumstance. Where the act is lawful for an individual, it can be the subject of a conspiracy when done in concert only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence."

Frequent recurrence to the fundamental principles of actionable conspiracy is essential to keep from ingrafting upon a judicial system something which is entirely new, to meet the desires of those who arrogate to themselves the right, not only to monopolize trade or effort in some particular field, but, under the guise of fair trade, to control or destroy the business of competitors without any expectation of profit to themselves—to wrongfully harm such competitors merely because they insist upon individual right to conduct individual business in one's own way. A combination with the malicious purpose indicated is an actionable wrong. Had it not been for section 4568, Rev. St. 1898, adding to the common-law essentials of an indictable conspiracy the necessity for an overt act, section 4466a would have been unnecessary to enable the court to punish, criminally, such wrongs. That is a mere declaration of the common law. It operates as a repeal, by implication, of section 4568 so far as otherwise a specific overt act would be required to render a malicious conspiracy, to injure the trade, business, reputation or profession of another, an offense. The old doctrine, with its ancient meaning, should be referred to in construing section 4466a. An actionable conspiracy is a combination of two or more persons for the purpose of accomplishing a criminal or unlawful object by criminal or unlawful means, or a lawful object by criminal or unlawful means. One may, through purely malicious motives, attract to himself another's customers and the injury be so slight in contemplation of law that *De minimis non curat lex* applies; but when he unites others with him to maliciously injure the business of another for the mere

gratification, in whole or in part, of a desire to inflict such injury, the condition of there being the combined force of many directed towards another, characterized by the element of malice, renders the act of combining for the particular purpose unlawful and a substantive offense, in the absence of a statute requiring some additional element. As said, in effect, in *Farmers' Loan & Trust Co. vs. Northern Pac. R. Co., supra*, the union of individual forces by agreement to accomplish the injury, gives to such agreement the character of a purpose to reach the end in view by violence, and the accomplishment thereof the character of a purpose effected by violence. The law never has and probably never will leave an individual, or class of individuals, remediless against such a wrong.

This opinion has been carried to great length. The justification therefor, if there is any, lies in the importance of the case and the numerous questions presented for decision. All of such questions, as regards the character of the wrong complained of, from the standpoint of counsel for defendants in error, have their best support in the three English cases to which we have particularly referred. A full discussion of them, as it seems, leaves little more that need be said. As indicated at the commencement, a long opinion was unavoidable if reference was to be made even briefly to the many points presented in the voluminous briefs of counsel. As it is, there are some to which we have referred only briefly, though it is believed that all have been covered in principle. Our conclusion is this: The term "malicious injury" as used in the statute, is synonymous with that term at common law; it refers to the infliction of a wrongful injury intentionally; such a wrong is actionable even though the same purpose, if formed and executed by an individual, would not in contemplation of law, be considered sufficiently serious to call successfully for legal redress. There is nothing in this militating at all against the right of individuals to combine and associate together for the purpose of promoting their individual welfare in any legitimate way. It strikes only at the assertion of a right of combining to resort to the use, as a single power, of the individual abilities and resources of two or more

to wrongfully accomplish harm to another in the line of tho things mentioned in the statute. It is in harmony with the do trine, so definitely stated by Baron Brammel in *Reg. vs. Druit* 10 Cox. Cr. Cas. 593, that it has often been quoted by courts a textwriters and nowhere rejected: "The liberty of a man's mi and will to say how he shall bestow himself and his means, h talents and his industry, is as much a subject of the law's pr tection as that of his body;" and "if any set of men agree amo themselves to coerce that liberty of mind and thought by co pulsion and restraint, they are guilty of a criminal offense."

The orders of the Circuit Court discharging the defendan in error are severally reversed and the cause is remanded wi directions to remand them to the sheriff of Milwaukee coun

DODGE, J., took no part.

From *Hawarden vs. Youghiogheny & Lehigh Coal Co.*, 1 Wis., 545, op. 549.

WINSLOW, J. The first count of the complaint is claimed state a cause of action at law to recover damages resulting fr an unlawful conspiracy, and the second count a cause of acti in equity on behalf of a class to restrain the further executi of the conspiracy, and both counts are challenged by demur for insufficiency of facts.

1. The gist of the first count is that the plaintiff was a tail coal dealer in the city of Superior; that the defendan "the wholesalers," own practically all the coal docks at Superi and Duluth, and that a retailer cannot carry on his business Superior unless he can buy of the wholesalers freely and wi out discrimination; that the wholesalers entered into a com nation with the defendant retailers by which it was agreed th the wholesalers should sell coal to the defendant retailers, a to none others, for the purpose, among others, of forcing out the retail trade all retailers not in the combination, and amo others the plaintiff; that such agreement or conspiracy has be

successful, and as a result thereof the plaintiff's business has been destroyed, to his damage. Do these facts constitute a cause of action at common law? We think they do. It is undoubtedly true that, in the absence of any statute to the contrary, several persons may combine for the purpose of increasing their business and making greater gains by any legitimate means, and if, as the incidental result of that combination, others are driven out of business, there is no actionable wrong. It is also true that one person, or a number of persons, by agreement may refuse to sell goods to another, if the purpose of such refusal be simply to promote his or their own welfare. From these propositions it is argued that no actionable wrong is shown in the present case; that the main purpose of the agreement charged was the lawful purpose to increase their own gains by legitimate means, and hence that the plaintiff is remediless, notwithstanding it is also charged that one purpose of the agreement was to drive the plaintiff out of business.

It may at once be admitted that this line of reasoning has been adopted by some of the courts which have been called upon to deal with the subject. It has not, however, been adopted by this court; in fact in the very recent case of *State ex rel. Durner vs. Huegin*, 110 Wis. 189, it was in effect repudiated. It is true that that case was a criminal case, but it necessarily involved the question of civil conspiracies at common law, as well as criminal conspiracies, and to the very full discussion there given by Mr. Justice Marshall it seems that very little can profitably be added. It was there stated, in substance and effect, that persons have a right to combine together for the purpose of promoting their individual welfare in any legitimate way, but where the purpose of the organization is to inflict injury on another, and injury results, a wrong is committed upon such other; and this is so notwithstanding such purpose, if formed and executed by an individual, would not be actionable. One person may, through malicious motives, attract to himself another's customers, and thus ruin the business of such other without redress; but when a number of persons, acting wholly or in part from such malicious motives, combine together, the injury

to such other is actionable. "Where the act is lawful for a individual, it can be the subject of conspiracy, when done i concert, only where there is a direct intention that injury sha result from it."

These principles are decisive as to the first count in th complaint. The allegation is distinct and clear that one of t purposes and objects of this agreement was to drive the plainti out of business. This was an ulterior and unlawful purpos and constitutes malice in contemplation of law. Therefor under the allegations of the complaint, it is clear that the co bination here formed was formed for the malicious purpose doing an injury to another, and that such injury has resulte and hence that a cause of action at law for damages is stated.

The conclusion reached renders it unnecessary to consid the effect of Sec. 1747e, Stats. 1898, with regard to combinatio in restraint of trade or commerce.

2. In the second count the plaintiff attempts on behalf of class of persons, namely, the retailers who were excluded fro the combination, to obtain equitable relief by way of a perpetu injunction restraining the continuance of the operations of t conspiracy. That courts of equity have jurisdiction to restra such conspiracies when irreparable injury will result and leg remedies will prove inadequate or a multiplicity of suits necessary, seems to be well settled. *Beck vs. Railway T. Union,* 118 Mich. 497. That the conspiracy may be direct against a considerable number of persons as well as against on cannot be doubted. We have, therefore, before us an unlawf conspiracy directed against a large number of persons, whi has already resulted in driving out of business a considerab number of such persons, and which the defendants threaten continue indefinitely against the whole class.

Plaintiff claims that this situation brings the case with that provision of the statute contained in Sec. 2604, Stats. 189 which declares, "When the question is one of common or gener interest of many persons, * * * one or more may sue f the benefit of the whole." The question as to the legality of th conspiracy is certainly one of common and general interest

all persons against whom it was directed and is being enforced. The complaint alleges that there are many of such persons, and we are unable to perceive any fault in the plaintiff's contention. It is to be noted that there are two cases named in the statutes referred to in which one may sue for all, viz: (1) When the question is one of common or general interest of many persons, and (2) when the parties are very numerous, and it is impracticable to bring them all before the court. The latter class was under consideration in the cases of *George vs. Benjamin*, 100 Wis. 622, and *Hodges vs. Nalty*, 104 Wis. 464; hence what is said in those cases as to the number of persons which will be deemed "very numerous" is inapplicable here, because this case comes under the first subdivision, which only requires the presence of a question of common or general interest of many persons. These conditions are satisfied here, and we conclude that the second count states a good cause of action in equity by the plaintiff on behalf of himself and a class composed of all other retail coal dealers in Superior similarly situated.

Thus there are two good causes of action stated in the complaint, one at law and one in equity, both arising out of the same transaction. But here arises for consideration the general demurrer to the whole complaint on the ground that two causes of action have been improperly united. Though this demurrer was not specifically referred to in the order appealed from, for the reason that the court held that but one good cause of action was stated, still it was, in effect, overruled as a necessary result of that order.

The statute provides that causes of action, in order to be united in one complaint, "must affect all the parties to the action." Stats. 1898, Sec. 2647. It is clear that this limitation would be violated if the two causes of action in this complaint are allowed to be united in one complaint. The first cause of action is a straight action at law for damages to the plaintiff alone. No one else has any interest in the judgment in that action, whatever it be. But the second cause of action is a cause of action in favor of a large number of persons, constituting a class represented by the plaintiff. Potentially all of the class

are parties. They are invited to become formal parties plaintiff, and presumably will accept the invitation. Thus the first cause of action affects but one party plaintiff, whereas the second cause of action affects numerous parties plaintiff. The doctrine is frequently stated that the several causes of action for or against a person must affect him in the same capacity in order to make them capable of being joined. Pomeroy, Code Remedies (3d Ed.), § 502.

These considerations are conclusive to the effect that the general demurrer to the whole complaint on the ground of improper joinder should have been sustained.

BY THE COURT:—That part of the order overruling the demurrer to the first count of the complaint is affirmed, and that part sustaining the demurrer to the second count is reversed, and the action is remanded with directions to overrule the demurrer to the second count and sustain the separate demurrer to the entire complaint, and for further proceedings according to law."